No. 243.

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Brief of Humphrey and Davis for P. E.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

Filed Mar. 14, 1898.

THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY,
Plaintiff in Error,

VERSUS

THE PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA,
Defendant in Error.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

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IN THE

Supreme Court of the United States.

COUNTY OF MERCER, STATE OF KENTUCKY, - *Plaintiff in Error,*

VERSUS

PROVIDENT LIFE & TRUST COMPANY OF PHILADELPHIA,
Defendant in Error.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

This is an action at law brought by the Provident Life & Trust Company against the County of Mercer in the United States Circuit Court for the District of Kentucky. The Trust Company sought to recover several installments of coupons taken from $100,000 in par value of the bonds of that county. In the court of first instance a jury was waived, under the statute, and the facts found by the Honorable John W. Barr, sitting as Circuit Judge. Judgment was rendered in favor of the Trust Company for the amount claimed.

From this judgment a writ of error was taken by the County to the United States Circuit Court of Appeals for the Sixth Circuit. The judgment was there reversed and the case remanded, with directions to enter a judgment in favor of the county. The opinion of the trial judge is given at page 34 of the record. The opinion of the Circuit Court of Appeals is reported 72 F. R. 144, 19 C. C. A. 414, and is also contained in the record at page 43.

The case turns upon the construction and effect to be given to the act of the Kentucky Legislature authorizing the county to subscribe for stock in the Louisville Southern Railroad Company, and issue bonds in payment therefor. This is printed in full in the appendix to this argument.

The county-seat of Mercer County is Harrodsburg. The Louisville Southern was a railroad projected to start from Louisville and run southeastwardly, through the counties of Jefferson, Shelby, Anderson, and Mercer, and beyond that to the Tennessee line.

At the time of the passage of the act allowing Mercer County to subscribe stock to this railroad, a company, called the Southwestern Railroad Company, had a line of railroad from Harrodsburg, running southeast about four miles to a junction with the Cincinnati Southern Railroad, the junction point being in Mercer County, about three fourths of a mile south of a station called Burgin. Through this railroad the people of Mercer County, contiguous to Harrodsburg, had railroad facilities south to Chattanooga and north to Cincinnati.

The act authorizing the subscription to stock gave the county the right to issue negotiable bonds in payment of such subscription. It provided for a vote of the people upon the question of subscription, directed the county judge to ascertain whether a majority of the legal votes cast at the election were in favor of the subscription, and if they were, further directed him to enter an order subscribing in behalf of such county to the capital stock of such railroad company, in accordance with the terms of the proposition voted on; and further provided that he should "thereupon cause to be prepared and executed the negotiable bonds of such county as before mentioned; which should be signed by him as county judge and attested by the county clerk with his official seal affixed thereto; and the coupons should be signed by said clerk."

The act further provided as follows:

"The said bonds shall not be binding or valid obligations until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same; at which time they shall be delivered to the said railroad company in payment of the subscription of such county; and the county shall thereupon be entitled to receive certificates for the stock subscribed; and the county judge of such county shall order that such bonds shall be deposited with a trustee or trust company, to be held in escrow and delivered to the said railroad company when it shall become entitled to the same by the construction of its road through such county; provided, however, that such trust company or trustee shall, before receiving such bonds, give bond, with good surety, approved by the county judge, for the faithful performance of his or its duty in the premises; and provided, further, that no such subscription shall be binding unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg."

The county voted, under certain terms and conditions to be hereafter mentioned, to subscribe $125,000 to the stock of the railroad.

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The county judge at once executed these bonds and delivered them to a trustee appointed by the county court.

The railroad company built its line from Louisville through the counties above named, entering Mercer County on its northern line and going thence to Harrodsburg. It there connected its line with the line of the Southwestern Railroad, and acquired the capital stock of that company. It then extended that road north from its junction point with the Cincinnati Southern, about three quarters of a mile, to the town of Burgin, but did not build it to the county line.

The first trustee appointed by the county court resigned. Thereupon another trustee was appointed, and he, in August, 1888, delivered to the railroad company 105 of these bonds—of which 100 are represented in the suit now before the court.

It can not be claimed that the railroad was ever built through the county. It is our contention that the acquisition of the Southwestern Railroad did not come within the terms of the act; but even if it did, still the condition upon which the bonds were to be the valid obligations of the county has not been fulfilled because the railroad stopped two miles short of the county line. (R. 27.) The controversy at last turns upon whether a purchaser of the bonds must take notice of the facts, and as to whether the condition not having been complied with, the bonds are, as the act declares them to be, "not the valid or binding obligations of Mercer County."

Facts.

The trial court found the facts of the case to be substantially as follows: (R. 16.)

That the County Court of Mercer County was petitioned on the 18th of November, 1886, by more than twenty-five resident taxpayers of the county, to submit to the vote of the legal voters of the county the question of whether or not the county should subscribe $125,000 in the capital stock of the Louisville Southern Railroad Company upon certain terms and conditions stated in the petition. These terms and conditions were as follows:

"Such bonds shall not be binding or valid obligations until the railroad of the said company shall have been so completed through such county that a train of cars shall have passed over the same; nor shall such subscription be binding unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg or a connection with the Southwestern Railway at its present depot in Harrodsburg; nor shall said bonds be delivered until the said railroad

company shall have constructed in Harrodsburg, or within one half mile thereof, a round house with not less than ten stalls, and shall have entered into an agreement in writing with the county judge of such county, for the benefit of such county, to erect in Harrodsburg, or within one quarter of a mile thereof, and within one year thereafter, to construct and operate permanently there its terminal or divisional machine and repair shops, and such other shops or structures as may be necessary or convenient to the operation thereof; such agreement to be executed by the proper officers of said railroad company, accompanied by a certified copy of the resolution or proceedings of the stockholders of said company authorizing such agreement; and $20,000 of such county bonds shall be retained in the hands of the trustee or trust company hereinafter named as additional security for the performance of said agreement by said railroad company, and shall not be delivered to it until it shall have constructed the machine and repair shops and other structures mentioned in and contemplated by the aforesaid agreement."

The railroad was to comply with the conditions of the subscription within five years from the time it was made, else it was to be void and the bonds canceled. If the majority of the legal votes cast at the election should be in favor of the subscription, the bonds were to be executed and deposited with the trustee or trust company designated by the county judge, to be held as set forth in the act; but before delivery all past due coupons attached to the bonds were to be clipped therefrom and destroyed by the trustee or trust company in the presence of the judge. The trust company or trustee designated as a depositary, before receiving the bonds, was to execute an obligation, with good surety approved by the county judge, for the faithful performance of his duties in the premises. As bonds were delivered to the railroad company certificates for stock in that company were to be delivered to the county judge for the use and benefit of Mercer County.

In pursuance of this petition and in pursuance of the notice required under the act an election was held, the result of which was determined by the county judge of Mercer County to be that for the the railroad subscription there were 1,683 votes, and against it, 1,250 votes. It being thus determined that a majority of the legal votes cast at the election were in favor of the subscription, the county court ordered that the county should subscribe to the capital stock of the railroad $125,000, the subscription being made subject to and in accordance with the terms and conditions of the proposition as set forth above. The subscription was accordingly made upon the order book of the court.

Thereupon at once the county judge prepared and executed the $125,000 of bonds and delivered the same to D. L. Moore, who was

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appointed, after motion by the railroad company, the trustee to hold the bonds in escrow. Mr. Moore gave bond to insure his faithful custody and delivery of these obligations, but subsequently, on the 3d of July, 1888, resigned. Thereupon one Isaac Pearson was appointed trustee, and gave bond, Mr. Moore delivering to him the $125,000 of bonds. The railroad company, with sureties, executed to Mr. Pearson a bond indemnifying him against any loss if he would deliver 105 of the bonds; which he accordingly did.

The court found that prior to June 1, 1888, the railroad had been completed from the city of Louisville to Harrodsburg, and that the railroad company then owned all the capital stock of the Southwestern Railroad; had taken possession of its line and extended the track to Burgin; and that on that day, viz., June 1, 1888, a train of cars, moved by an engine, passed over the railroad from Louisville through Harrodsburg to Burgin, and returned over said track to Louisville; and that since said time the railroad from Louisville through Harrodsburg to Burgin has been continuously operated as the Louisville Southern Railroad.

The court further found that June 27, 1889, the Southwestern Railroad was consolidated with the Louisville Southern, but that this Southwestern Railroad had been constructed and operated prior to November, 1886, and ran from its depot in Harrodsburg to a junction with the Cincinnati Southern Railroad, about three quarters of a mile south of Burgin, and that after this railroad came into possession of the Louisville Southern it was extended to Burgin, and the junction made with the Cincinnati Southern at that point, and that this was done prior to June 1, 1888.

The court further found that from Harrodsburg to the point where the Louisville Southern crosses the line between Anderson and Mercer counties is fifteen miles; the distance from Harrodsburg over the Southwestern Railroad as extended was 4.72 miles; that Burgin was three miles from the south line of Mercer County, and from the extreme east line of Mercer County, 4.74 miles, and that following the line of the Cincinnati Southern to the south line of Mercer County, which is the dividing line between that county and Boyle, Burgin is distant three miles, and from Danville, seven miles.

The court further found expressly that the Louisville Southern Railroad did not run from one line of the county of Mercer through to the opposite or another line of the county.

The court further found that about the time of the passage of a train of cars from Louisville to Burgin, and for some time thereafter, there arose a question of whether the conditions precedent to the

delivery of 105 of the bonds of the county had been complied with by the Louisville Southern Railroad Company; that there was some difference of opinion among the taxpayers of said county upon this question, and the trustee, Moore, had doubts as to whether he could properly deliver these bonds; but there was no formal demand made upon nor refused by him before his resignation as trustee; that this question of whether the railroad must be built from one line of the county to another was publicly and generally discussed; that while this discussion was going on and before Pearson had determined that the condition precedent had been fulfilled and that he would deliver the $105,000 of the bonds, the Louisville Southern Railroad prepared to extend its railroad toward and to the town of Danville, Boyle County, which was 7.47 miles distant from Harrodsburg, by acquiring the rights of way, with one exception, to the Mercer County line; that there was a movement made to have the court of claims of the county instruct the trustee as to his duty in the premises; that that court, consisting of the county judge and the justices of the peace of the county, met on the 26th of June, 1888, and after a full discussion was had, the court declined, as a court, to instruct the trustee as to his action; but upon motion of one of the justices, they passed and had spread upon the records the following resolution:

"The members of this court do not believe that they have any right to enter an order directing the trustee to deliver the bonds of this county to the Louisville Southern Railroad, but as individuals they are of opinion that such delivery should be made, and the construction of the railroad not forced to the Boyle County line."

The court further found that Pearson, Trustee, after his acceptance of his trusteeship, decided that the conditions precedent had been complied with by the Louisville Southern, and it was entitled to the delivery of the 105 bonds of Mercer County; and that in August, 1888, he did deliver the bonds in the presence of the county judge, the past due coupons being then cut off, and there being then delivered to the county judge the certificate for $105,000 of the capital stock of the railroad company; that said stock was frequently voted by the county through the county judge and is still held by the county; that it has never been tendered to the Louisville Southern or any representative of it; that the county of Mercer regularly levied an annual tax to meet the semi-annual interest on said bonds, and paid interest thereon for the years 1889, 1890, and 1891, and the interest due January 1, 1892, and has not paid any interest on the bonds since that time; that an indemnifying bond was executed and delivered to

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Pearson, Trustee, about the time of the delivery of the 105 bonds, the terms of which are set out in the record; that this bond of indemnity was given to satisfy the sureties of Pearson and not to influence his judgment or action in deciding that the condition precedent had been fulfilled by the Louisville Southern Railroad Company; that the Trust Company was, at the institution of the suit, the bona fide holder of the bonds mentioned, to the extent of $100,000, with the coupons thereon, having purchased same from the Investment Company of Philadelphia, at par and accrued interest, without knowledge or notice of any defects either in the execution or delivery of same, or of any defenses the county of Mercer had or might present to the recovery of the same.

The findings of fact also set out in full the form of bond executed by the county.

Judgment having been rendered upon these findings, a writ of error was sued out by the county of Mercer to the Circuit Court of Appeals.

Assignments of Error.

The following were the assignments of error:

1. That the court erred in giving judgment for the plaintiff upon the special finding of fact.

2. That the court erred in finding that the plaintiff was a bona fide holder for value and without notice of the coupons sued on or the bonds from which they were taken, or any of said bonds or any of said coupons.

3. That the court erred in refusing to find that the Louisville Southern Railroad Company had failed to comply with the conditions precedent to the validity of the said bonds.

4. That the court erred in failing to adjudge that under the act authorizing the subscription by Mercer County to the stock of the Louisville Southern Railroad Company the bonds from which the coupons were taken herein were void and of no effect.

5. That the court erred in holding that Isaac Pearson, Trustee, had the right to determine the question as to the performance by the Louisville Southern Railroad Company of the conditions precedent to the validity of said bonds.

6. That the court erred in holding that the county of Mercer was estopped to say that the said conditions had not been fulfilled, and was estopped to say that the said bonds were invalid and not binding.

7. That the court erred in refusing to admit the testimony offered and rejected as set forth in the bill of exceptions.

These errors need not be separately considered.

I.

The Power Given to The County of Mercer to Subscribe Stock and Issue Bonds was Not an Unlimited Power.

We believe it expedient to notice in the very first of the discussion of this case the fact that the Legislature of Kentucky refused to give to Mercer County any general power to subscribe stock in the Louisville Southern Railroad or to issue bonds in payment of such subscription. It was at one time considered very questionable whether a bare majority of the voters composing a municipality had the right to impose the burdens of taxation on the minority for the benefit of any kind of corporation. It has, of course, been long since settled that this can be done, but the power has always been recognized as a dangerous one, and efforts have been from time to time made to properly safeguard it. These, however, have proved so unavailing that in most of the States it has been found necessary to insert constitutional limitations as to this subject, and to positively prohibit such municipal subscriptions.

Any one who is acquainted with the history of Kentucky and of the counties adjacent to Mercer would know that they were for many years burdened down with debt contracted in the issue of bonds to railroads, not a rod of whose line had ever, in fact, been laid in the county.

The Legislature of Kentucky was aware of this history, and therefore, in passing this enabling act, guarded it with such restrictions as it was believed would certainly secure to the county that which was bargained for. It was the purpose of this law to provide that if a majority of the citizens of Mercer County should vote this subscription, they should not impose upon the minority that burden without an advantage deemed by the legislature to be the least which would be commensurate with the burden.

We find, therefore, in the act, provisions securing to the railroad and county the attainment of these objects:

First, before any subscription could be voted a certain number of persons must petition the county court to hold the election. The election having been had upon due notice, it was made the duty of the county judge to subscribe for the amount of stock thus voted.

Second, at once, upon this subscription being made, it became the duty of the county judge to execute the bonds of the county in payment therefor, but he was prohibited from issuing these bonds.

Third, the bonds so executed were to be placed in the hands of a depositary, to be held in escrow until the condition upon which the

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validity of the bonds was declared by the legislative enactment to depend should be fulfilled; and the law declared that the bonds should "not be valid or binding obligations" until and unless one of these legislative conditions was fulfilled.

Fourth, to make this more sure the technical word "escrow" was used, and a bond was to be required of the depositary in escrow to answer in damages in case of failure upon the part of the depositary to faithfully perform the duty imposed by law; this bond being for the benefit of the railroad and of the county in a way that we shall hereafter show.

The majority in favor of these bonds was a very small one—the vote in the affirmative being 1,683, and in the negative 1,250.

The legislature said in so many words: "The said bonds shall not be binding or valid obligations until the railway of said company shall have been so completed through such county that a train of cars shall have passed over the same."

The facts in this case show that the railroad has never been so completed.

We believe it to be quite clear that the purchase by the Louisville Southern of the Southwestern Road from Harrodsburg to a junction with the Cincinnati Southern can not be considered as in whole or in part compliance with this condition. It was not the purpose of the legislature to allow the majority of the people in Mercer County to tax the minority in order that a new company might buy an old road. But even assuming that this is not true, still, counting this purchased road with the road that was built by the Louisville Southern, the condition was not fulfilled.

And yet it is insisted, in the face of this law, that the bonds are binding and valid obligations of Mercer County.

The purpose of the law in having the bonds executed in advance of the compliance by the railroad company with the condition was to enable the railroad to certainly obtain the bonds when the condition should have been fulfilled. In order to safeguard Mercer County it was provided that notwithstanding the execution of the bonds in advance of the performance of the condition, still they should not be delivered until after its performance, and that they should not be binding or valid obligations until the condition had been absolutely performed.

We respectfully submit, in reference to this condition and the knowledge of all persons buying the bonds as to its being a prerequisite to their validity, that the opinion of the Circuit Court of Appeals is conclusive in its reasoning.

We make the following extract:

"The argument that this was a substantial compliance with the condition does not meet with our assent. The object of the act was to secure to Mercer County a railroad entirely through the county. To build to within two miles of the statutory requirement is not a substantial fulfillment of the provision. Whether this was an important or unimportant matter it is not for us to say. The legislature had the undoubted authority to impose this condition, or any other it saw fit. Whether wisely or unwisely, the power to issue any bonds was made dependent on the performance of this condition. The provisions that they should not be valid until the performance of this condition, and that the stakeholder should not deliver them until this railroad should be constructed through the county, are imperative, and limit the power of the county and of this trustee to the issuance of bonds only when the requisite facts actually existed. These restrictions were intended to secure the actual completion of the railroad, and guard against the possible misapplication of the bonds to purposes not designed. Restrictions in acts of this kind, intended to guard the public from the negligence or crimes of their officials, and to secure exact compliance with the terms upon which the power of taxation may be exercised in aid of railroad construction, are entitled to favorable consideration. The utterances of the Supreme Court upon the effect of restrictions and limitations in such legislation have been uniform, and announce a wise public policy. In Barnum v. Okolona, 148 U. S. 393, 13 Sup. Ct. 638, Mr. Justice Shiras, for the court, said:

"'That municipal corporations have no power to issue bonds in aid of railroads, except by legislative permission; that the legislature, in granting permission to a municipality to issue its bonds in aid of a railroad, may impose such conditions as it may choose; and that such legislative permission does not carry with it authority to execute negotiable bonds, except subject to the restrictions and conditions of the enabling act, are propositions so well settled by frequent decisions of this court that we need not pause to consider them. Sheboygan Co. v. Parker, 3 Wall. 93–96; Wells v. Supervisors, 102 U. S. 625; Claiborne Co. v. Brooks, 111 U. S. 400, 4 Sup. Ct. 489; Young v. Clarendon Tp., 132 U. S. 340–346, 10 Sup. Ct. 107.'"

In Citizens Saving Association v. Perry County, 156 U. S. 693, the bonds were voted on condition, among other things, that the railroad company should locate its machine shops at Duquoin. The bonds were issued, but the shops were located at East St. Louis. The court held the bonds void. In reference to the condition, the court said: (Page 704.)

"We can not assume that the location of the company's machine shops at Duquoin was deemed by the voters to be a matter of no consequence. It may well be that the election turned upon the question of the location of those shops in the county at a named place."

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A fortiori must this doctrine obtain where the condition is one which has been prescribed by the only legislative authority authorizing the issue of the bonds, and where the whole election has proceeded upon the basis of this authority, coupled with this condition.

II.

The Purchaser is Bound to take Notice of the Law under which the Bonds are Issued.

This is so obvious a corollary from the proposition first stated that authority is hardly necessary to be cited. We, however, give an extract from the opinion of this court in Barnett v. Denison, 145 U. S. 139; which shows that it is sustained by many cases in this court:

"It is the settled doctrine of this court that municipal corporations are merely agents of the State Government for local purposes, and posses only such powers as are expressly given, or implied, because essential to carry into effect such as are expressly granted; 1 Dill. Mun. Copr., Section 89; Ottawa v. Carey, 108 U. S. 110; that the bonds of such corporations are void unless there be express or implied authority to issue them; Wells v. Supervisors, 102 U. S. 625; Claiborne County v. Brooks, 111 U. S. 400; Concord v. Robinson, 121 U. S. 165; Kelley v. Milan, 127 U. S. 139; that the provisions of the statute authorizing them must be strictly pursued; and that the purchaser or holder of such bonds is chargeable with notice of the requirements of the law under which they are issued. Ogden v. County of Daviess, 102 U. S. 634; Marsh v. Fulton County, 10 Wall. 676; South Ottawa v. Perkins, 94 U. S. 260; Northern Bank v. Porter Township, 110 U. S. 608; Hayes v. Holly Springs, 114 U. S. 120; Merchants Bank v. Bergen County, 115 U. S. 384; Harshman v. Knox County, 122 U. S. 306; Coler v. Cleburne, 131 U. S. 162; Lake County v. Graham, 130 U. S. 674."

III.

No Recital in a Bond is Conclusive unless it is of something which the Officer Certifying has the Legal Right to Certify.

In Davis County v. Dickinson, 117 U. S. 664, a county judge had endorsed a certificate upon the back of the bonds. The court said:

"The certificate is not a recital in the bond. It is not the act of the county court; is not under its seal nor signed by its clerk, but is simply the certificate of the person holding the office of judge of that court. Neither the statute nor the vote of the people nor the

order of the county court empowered him to make such a certificate or to determine the question whether the county court had exceeded the power conferred upon it. An officer's certificate of a fact which he has no authority to determine is of no legal effect."

So in Dixon County v. Field, 111 U. S. 94, the court, after commenting upon the leading case of Town of Coloma v. Eaves, 92 U. S. 484, says:

"If the officers authorized to issue bonds upon a condition are not the appointed tribunal to decide the fact which constitutes the condition, their recital will not be accepted as a substitute for proof. In other words, where the validity of the bonds depends upon an estoppel claimed to arise upon the recitals of the instrument, the question being as to the existence of power to issue them, it is necessary to establish that the officers executing the bonds had lawful authority to make the recitals and to make them conclusive. The very ground of the estoppel is that the recitals are the official statements of those to whom the law refers the public for authentic and final information on the subject."

To the same effect is German Bank v. Franklin County, 128 U. S. 542.

And in Citizens Savings Association v. Perry County, 156 U. S. 703, this court says:

"And what was said in German Bank v. Franklin County, in relation to the registration of the bonds, is applicable to the present case: 'The registration of the bonds by the State auditor has nothing to do with any of the terms or conditions on which the stock was voted or subscribed. Neither the registration nor the certificate of registry covers or certifies any fact as to compliance with the conditions prescribed in the vote on which alone the bonds were to be issued. The recital in the bonds does not contain any reference to the act of April 16, 1869, or certify any compliance with the provisions of that act; and the certificate of registry merely certifies that the bond has been registered in the auditor's office pursuant to the provisions of the act of April 16, 1869. The statute does not require that the auditor shall determine or certify that the bonds have been regularly or legally issued.'"

IV.

Recitals are to be Construed Naturally and Not in a Forced Way.

In School District v. Stone, 106 U. S. 186-7, this court said:

"This construction of the words employed in the bonds is characterized by counsel for the defendant in error as too narrow and technical. It may be a strict construction, and such, it seems to the court, ought

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to be the rule when it is proposed, by mere recitals upon the part of the officers of a municipal corporation, to exclude inquiry as to whether bonds, issued in its name, were made in violation of the Constitution and of the statute, of the provisions of which all must take notice. Numerous cases have been determined in this court, in which we have said that where a statute confers power upon a municipal corporation, upon the performance of certain precedent conditions, to execute bonds in aid of the construction of a railroad, or for other like purposes, and imposes upon certain officers—invested with authority to determine whether such conditions have been performed—the responsibility of issuing them when such conditions have been complied with, recitals, by such officers, that the bonds have been issued, 'in pursuance of,' or 'in conformity with,' or 'by virtue of,' or 'by authority of,' the statute, have been held, in favor of bona fide purchasers of value, to import full compliance with the statute, and to preclude inquiry as to whether the precedent conditions had been performed before the bonds were issued. But in all such cases, as a careful examination will show, the recital fairly imported a compliance, in all substantial respects, with the statute giving authority to issue the bonds. We are unwilling to enlarge or extend the rule, now established by numerous decisions. Sound public policy forbids it. Where the holder relies for protection upon mere recitals, they should, at least, be clear and unambiguous, in order to estop a municipal corporation, in whose name such bonds have been made, from showing that they were issued in violation, or without authority, of law."

In the case at bar, as will be seen by reference to a copy of the bond printed in the appendix, the only recital is as follows:

"This bond is one of a series of 125 bonds of even date herewith, all of the same denomination and tenor, and numbered consecutively from 1 to 125; the same having been issued pursuant to the authority conferred upon the said county by an act of the Legislature of Kentucky, entitled 'An Act to authorize the County of Mercer to subscribe aid to the Louisville Southern Railroad Company,' approved May 15, 1886; and pursuant to an order entered by the county judge of said county in conformity with said act, subscribing in behalf of said county for the capital stock of the Louisville Southern Railroad Company in the sum of $125,000; which order was entered of record in said court on January 10, 1887."

The bond bears the same date, viz., January 10, 1887, and is signed County of Mercer by John W. Hughes, County Judge; Attest: Ben C. Allin, Clerk.

If we now turn to the act under which these bonds were issued, and which is also printed in full in the appendix, it will be found that it was an act approved May 15, 1886.

The recital shows that the order for subscription under the terms of that act was entered in the court January 10, 1887. The act

expressly provides that the election being held in pursuance of Section 2 of the law, as soon as may be thereafter, the county judge shall determine if a majority of the legal votes cast at the election were in favor of the subscription, and if they were he shall thereupon enter an order subscribing in behalf of the county to the capital stock of the railroad company in accordance with the terms of the proposition voted on, and shall thereupon cause to be prepared and executed the negotiable bonds of such county as before mentioned, which shall be signed by him as county judge and attested by the county clerk with his official seal affixed thereto, and the coupons shall be signed by the clerk.

The next section provides that the said bonds "shall not be binding or valid obligations until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same;" at which time they shall be delivered to the said railroad company in payment of the subscription of such county, and the county shall thereupon be entitled to receive certificates for the stock subscribed, and the county judge of such county shall order that such bonds shall be deposited with a trustee or trust company, to be held in escrow and delivered to the said railroad company when it shall become entitled to the same by the construction of its road through such county.

It is here provided quite as distinctly, it seems to us, as language can provide, that as soon as the order of subscription is made the county judge and county clerk shall immediately execute the bonds and deposit them with a trustee or trust company to be appointed by the county judge. And that it belongs to such trustee or trust company to hold them in escrow until the conditions set forth in the act have been performed.

If, therefore, the purchaser of these bonds read this law and believed this recital to be true, it knew that the county judge and county clerk had, immediately upon the order of subscription being made, executed the bonds; that is, signed and sealed them, and delivered them to a trustee or trust company to hold in escrow until the condition had been performed.

So far from its being the duty of the county judge and county clerk to withhold the execution of the bonds until the condition was performed, the act expressly made it their duty to execute them in advance of the condition being performed.

The purpose of this was obvious. It was to secure the railroad company in the bonds provided it should perform the condition, and not to leave the railroad company in a position where it would have to bring

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an action against the county authorities to compel them to execute the bonds; but to make sure that the bonds should be in the hands of a trustee or trust company in escrow for the railroad company, guarded by a covenant to be given by such trustee or trust company to secure the railroad company in the compliance with the full duty in the premises.

Again, there is no room for the contention that it was the duty or province of the county judge and county clerk (the only officers whose signatures are attached to these bonds and to the recitals contained in them) to determine whether the railroad company had performed the condition upon which alone the statute declared that the bonds should be valid and binding.

The act expressly made it the duty of the trustee or trust company to hold these bonds in escrow and deliver them to the railroad company when it should become entitled to them by the construction of the road through the county.

It was therefore beyond the power of the county judge and county clerk to make these instruments complete. In other words, it was expressly forbidden to them to make delivery of the bonds. (Young v. Clarendon Township, 132 U. S. 353.)

We therefore submit that the legislature has here lawfully imposed as a condition upon the validity of these bonds that they shall not be binding or valid obligations until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same, and the defendant in error, being bound to take notice of the law under which the bonds were issued, knew of this condition upon their validity, and also knew that the county judge and county clerk had no right to make any recital in the bonds which should in any way certify that the condition had been performed.

It is also obvious that the natural construction of the recital is that the county judge and county clerk have done what the statute required them to do, and not what the statute forbade them to do; that they have executed the bonds by attaching their signatures and delivering them to a trustee or trust company to hold in escrow.

The facts of this case are that all this was done in the order in which it should have been done. We have, therefore, a case where the bondholder knew that the securities which he was buying could not have become the binding or valid obligations of Mercer County unless and until the railroad had been completed through that county; and where the purchaser of these securities knew that not only had not the county officers certified to the performance of this condition,

but that it was beyond their power to so certify; and where such purchaser knew that these securities had left the hands of the county judge and county clerk as incomplete instruments, and had been delivered to a third person—either a trustee or trust company—to hold in escrow and to be delivered only when the railroad company should have complied with the condition imposed by the legislature upon the validity of the bonds.

V.

In the Absence of a Recital by one Authorized to Make it That the Conditions Precedent to the Validity of Municipal Obligations Have Been Performed it is Open to the Municipality to Prove Their Non-Performance.

In the case at bar the allegation in the petition of the defendant in error is as follows:

"The said county judge caused said bonds to be deposited with one Isaac L. Pearson as trustee, to be held in escrow and delivered to the said Louisville Southern Railroad Company when it should become entitled to the same by the construction of its said railroad through the county of Mercer, and into or through the corporate limits of the town of Harrodsburg in Mercer County, and before receiving said bonds, said trustee gave bond, with good surety, approved by said county judge, for the faithful performance of its duty.

"Plaintiff further states that afterwards, and within the time provided for by said act, and by the terms of the proposition submitted and voted upon at said election, as hereinbefore set forth, the Louisville Southern Railroad Company did construct and so complete its said railroad through said county of Mercer that a train of cars could pass and did pass over the same; and did construct said railroad to and through the corporate limits of the town of Harrodsburg, and thereupon demanded a delivery of said bonds to the amount of $105,000." (R. 8.)

The petition then goes on to state what the trustee did, and concludes thus:

"Thereupon and thereafter the said trustee did deliver to the Louisville Southern Railroad or its assigns said bonds to the amount of $105,000 par value thereof; to wit, the said bonds numbered serially from 1 to 105, both inclusive; said delivery having been made about the month of August, 1888." (Record 8 and 9.)

There is no allegation that Pearson decided any thing.

The defendant, in its answer, traversed this allegation of the performance of the condition and also affirmatively alleged the non-performance by the railroad company of this condition. (Record 11 and 12.)

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The plaintiff, in its reply, again alleged the performance of the condition.

The court found not that the condition had been complied with, but that Isaac Pearson, Trustee, had decided that it had been complied with, and upon such decision had delivered the bonds to the railroad company.

As we understand it, it is the contention of the defendant in error that the trustee or trust company, to be appointed under Section 4 of this Act, had the right to conclusively determine the question of the performance of this condition, and that upon proof by a bona fide purchaser of these bonds that the trustee or trust company did in fact make such decision, and did, in fact, in consequence thereof, deliver the bonds, this raises an estoppel against the county the force of which is to absolutely prevent the county from showing the truth in regard to the matter in controversy.

We have, therefore, not a case where an effort is made to estop the county by a recital but by the decision of an individual to whom its bonds have been delivered in escrow; and the force of this decision is claimed to be such that although the act of the legislature under which the bonds were issued expressly provided that they should not be the binding or valid obligations of the county until the condition had been fulfilled, yet the decision of this depositary in escrow, though in parol and in no way recorded or recited, is the end of the matter.

No case has been cited either from this court or any other court holding that in the absence of a recital the municipality is estopped by proof *en pays* that a county officer has decided that a condition precedent has been performed. Such a view, it seems to us, if entertained by this court, must long since have found expression in some of the many cases where it is evident that county authorities having power to determine the existence of conditions precedent, and whose recital of the performance of them has been held conclusive, have determined the existence of such conditions precedent, and yet the determination, in the absence of the recital, has not estopped the county from showing the truth.

In Chambers County v. Clews, 21 Wallace, 321, this court said:

"We have held many times in relation to bonds of this character that where the persons appointed by law to certify that the preliminary requisites have been complied with do so certify, their certificate is conclusive in favor of the holder who, on the strength of such certificate, pays his money for the bonds, without notice of the defect or illegality. We have never, however, held that such defect or irregu-

larity could not be set up by the maker of the bonds where the suit upon them was brought by one who had not paid value for them or who had notice of the defect or irregularity."

If the determination is a finality we can not understand why it is not as conclusive in favor of one who believes it to have been erroneously concluded as it would be in favor of one who believes it to have been rightly decided.

In Nesbit v. Riverside Independent District, 144 U. S. 619, the court, it seems to us, decided this exact question. That was a suit upon district bonds. The defense was that the amount of the bonds, of which plaintiff had notice because of his ownership of them, exceeded the debt which the district could legally incur. The court held that having such notice, he could not recover. It was insisted, however, that the question was *res adjudicata*, as the same plaintiff had theretofore recovered upon certain coupons taken from the same bonds. The court, however, held that the causes of action were different. In the suit on the coupons the plaintiff had the right to rely upon the recitals in the bonds; that the statutory limit of debt was not exceeded, and by that means could estop the county from making the defense; but in the second case, the very ownership by the plaintiff of so many bonds itself affected him with notice that the statutory limit had been exceeded, and therefore the county was not estopped by a recital which the plaintiff, if he had examined the assessment roll, would have known was not true.

The court said:

"The effect of recitals in municipal bonds is like that given to words of negotiability in a promissory note. They simply relieve the paper, in the hands of a bona fide holder, from the burden of defense other than the lack of power growing out of the original issue of the paper and available as against the immediate payee. . . . In the suit at Des Moines no notice to the holder was shown. The recitals cut off the defense pleaded of original invalidity. In this action notice is proved, and an additional fact is put into the case, which makes a new question. The effect of recitals is one thing; that of recitals coupled with notice is another. The one question was litigated and determined in the Des Moines suit; the other is presented here."

Now if the rationale of the rule is that the recital is mere evidence of decision, and the decision is the vital and binding thing, then the case just cited proceeded upon a radically erroneous view; because there was as much of decision in the one case as in the other. But in the one case the holder of bonds had the means which put him upon inquiry as to the correctness of the decision, or made it his duty

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to ascertain its correctness, while in the other the county, being estopped by the recital, there was no obligation upon the holder of the securities to further inquire.

It is to be noted that a large proportion of the cases cited by counsel for defendant in error in support of the position that the recital is mere evidence of decision, and that decision is as good as recital, are mentioned in the case of Coloma v. Eaves, 92 U. S. 484.

A careful examination, however, of the leading case of Buchanan v. Litchfield, 102 U. S. 278, will show that this court, after reviewing all of the cases preceding that one, settled the question that the fact that the bonds were issued is not in itself conclusive proof in favor of a bona fide holder that the circumstances existed which authorized them to be issued.

It is there pointed out that in every case previously decided the court had expressly called attention to the fact, which always existed, that there was such a recital as implied the performance of all conditions precedent by an officer who had power to determine their existence. The court italicizes from Town of Coloma v. Eaves, the language: "*their recital that it has been;*" and from Orleans v. Pratt, the language: "*recite the circumstances which bring them within the power;*" and from Kenicott v. Supervisors, the words: "With a *recital* that the election has been held, or that the fact exists or has taken place."

And the court calls attention to the cases of County of Moultrie v. Savings Bank, and Marcy v. Township of Oswego, as adhering to the rule announced in Town of Coloma v. Eaves, because of the *recital* in the bonds.

In the late case of Citizens Saving Association v. Perry County, 156 U. S. 701, this court said:

"But it is urged that the bonds having been executed and issued by those whose duties it was to execute and issue them, whenever that could be rightfully done, the county is estopped to plead their invalidity as between it and a bona fide purchaser for value. This argument would have force if the material circumstances bringing the bonds within the authority given by law were recited in them. In such a case, according to the settled doctrines of this court, the county would be estopped to deny the truth of the recital as against bona fide holders for value. But this court, in Buchanan v. Litchfield, 102 U. S. 278, 292, upon full consideration, held that the mere fact that the bonds were issued, without any recital of the circumstances bringing them within the power granted, was not in itself conclusive proof in favor of a bona fide holder that the circumstances existed which authorized them to be issued."

This is said in a case where the validity of the bonds is challenged for a failure upon the part of the railroad company to build its machine shops within the county. The bonds were issued by officers who had power and whose duty it was to determine whether all of the conditions precedent had been executed prior to the time when they should issue the bonds. This is proved by the express decision of this court in Oregon v. Jennings, 119 U. S. 92, where it is said:

"Within the numerous decisions by this court on the subject, the supervisor and the town clerk, they being named in the statute as the officers to sign the bonds, and the corporate authorities to act for the town in issuing them to the company, were the persons entrusted with the duty of deciding, before issuing the bonds, whether the conditions determined at the election existed. If they have certified to that effect in the bonds, the town is estopped from asserting, as against a bona fide holder, that the conditions prescribed by the popular vote were not complied with."

This is further exemplified by a consideration of the various cases which have been decided by this court upon the proper construction and effect to be given to an act of the Illinois Legislature upon the subject of conditions attendant upon municipal subscriptions, approved April 16, 1869. These cases are Insurance Company v. Bruce, 105 U. S. 328; Oregon v. Jennings, 119 U. S. 92; German Bank v. Franklin County, 128 U. S. 543; Citizens Saving Association v. Perry County, 156 U. S. 700; Graves v. Saline County, 161 U. S. 360.

In two of these cases, viz., Insurance Company v. Bruce, 105 U. S. 329, and Oregon v. Jennings, 119 U. S. 75, the bonds were held binding upon the county, notwithstanding the failure to perform the conditions precedent.

In the case of German Savings Bank v. Franklin County, 128 U. S. 542, they were held invalid.

In the case of Citizens Savings Association v. Perry County, 156 U. S. 693, there were two series of bonds—one held valid and the other invalid. The same was true of the original issue of the two series of bonds dealt with in Graves v. Saline County, 161 U. S. 361.

The essential difference between the act of April 16, 1869, of the Illinois Legislature, and the act under consideration in this case, is strongly set forth in the case of Insurance Company v. Bruce, 105 U. S. 329. It is there showed that this act did not *require* the county to annex any conditions whatsoever to its subscription, and that it did not *require* bonds to be issued in payment of a subscription *prior* to the time that such conditions were to be performed. Therefore it was

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held that although the act did provide that "such bonds, subscriptions or donations shall not be valid and binding until such conditions precedent shall have been complied with," yet if the bonds were issued with such recitals as fairly indicated that they conformed to this act, such recitals would be held as importing either that no conditions had been annexed or that such conditions as had been annexed had been performed.

The Supreme Court of Illinois held in the case of Town of Eagle v. Kohn, 84 Illinois, 292 (decided in 1876), that this provision of the act of 1869 was to be rigidly enforced, and bonds issued in payment of subscriptions were void where precedent conditions had not been performed.

This court, in Insurance Company v. Bruce, *supra*, distinguished this case by pointing out that it did not appear that the bonds there in controversy had such recitals in them as to estop the county from saying that the conditions had not been fulfilled.

It may be claimed that the case of the German Savings Bank v. Franklin County, *supra*, is based upon the declared obligation of this court to follow Town of Eagle v. Kohn in that case, because the bonds were issued after the decision of Town of Eagle v. Kohn; but in the case of Savings Association v. Perry County, this court decided, as the Supreme Court of Illinois decided in Town of Eagle v. Kohn, in a case where there were no binding recitals. And that this decision was the independent judgment of this court is showed by the fact that Town of Eagle v. Kohn is not even cited.

We have dwelt at some length upon these various cases because, while strikingly different in some of their features from the case at bar, they are, in some other features, quite analogous. They are analogous, and we think decisive, because the bonds were always held void in the absence of a recital. They are not as strong as the case at bar because the Illinois act did not impose in and of itself any precedent conditions, while in the case at bar the precedent condition is imposed in the act itself.

Again, they are less strong than the case at bar because there was no obligation, under the act of 1869, to execute the bonds prior to the performance of the conditions precedent, while in the case at bar the bonds were required to be executed immediately upon the subscription being made.

This, again, precludes any possibility of the conditions having been performed between the date of the subscription and the date of the bonds themselves, and therefore precludes the possibility of any recitals in the bonds importing a compliance with the precedent conditions.

The cases under the act of 1869 are again less strong than this case because, under that act, or the acts supplementary thereto upon which the bonds were issued in the various cases above cited, it belonged to the county judge or supervisor and clerk to determine whether the conditions precedent had been executed, and therefore a recital in a bond signed by them could be taken as evidence of such performance. But in the case at bar it did not belong either to the county judge or the county clerk to determine the performance of the condition precedent upon which these bonds were to be valid.

In all of these cases it is apparent that the supervisor and clerk must have determined that the conditions precedent had been performed, and yet, wherever the recital failed the bond failed. In illustration of this we call attention to the very strong statement made by the county judge of Perry County, in Citizens Saving Association v. Perry County, 156 U. S. 696, in sending forward a certificate under the county seal and verified by his oath, to the auditor of public accounts. It can hardly be contended that there had not been a decision prior to the sending forward of this certificate, or that any court would have hesitated to find as a fact, from the issuing of the bonds by the county judge and the clerk, and from the certificate thus made by the county judge, that the county officers had decided that the conditions had been fulfilled.

In reason, we submit, it can not be held that the decision of an executive officer upon the question as to whether or no a condition precedent has been performed is conclusive upon the parties. The books are full of cases where railroads have brought suits for mandamus against county officers to require them to subscribe, insisting that the proper conditions precedent have been performed; but if the function of the county official is a judicial one, then it is obvious that mandamus will not lie.

There are many cases also in the books of injunctions against such county officials. Here again it is clear that the remedy could not be had if their function is a judicial one. Such cases as School District v. Stone, 106 U. S. 184; Northern Bank v. Porter Township, 110 U. S. 609; Carroll Co. v. Smith, 111 U. S. 557, upon being examined show that it is obvious that there had been a decision by the county authorities, but as the recital had not estopped the county to claim that such decision was wrong, it was allowed to challenge it.

There is a wide difference between estoppel by decision and an estoppel by recital. A decision is a final judgment and conclusive determination of some subject matter in dispute between parties by some court or tribunal having jurisdiction of the dispute and of the parties.

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The effect of a decision by such a tribunal is not due to any relation of agency borne by it to the parties, but is wholly independent thereof. It operates by force of the law creating the tribunal and conferring upon it the power to determine the question.

On the other hand, a recital is a representation or statement made by a party in person or by some authorized agent, concerning the existence of a certain state of facts.

Therefore, in all cases of municipal corporations, as they can act alone through authorized agencies, the effect of the representation depends upon the authority of the agent to represent the municipality as its agent and to speak for it.

The effect of his recital is dependent entirely upon his relation as agent to the municipality for which he speaks.

The recital is a positive declaration of what has been done. It is fixed, definite, and permanent—a part of the bond itself. It speaks to every purchaser of the bonds, and assures him that the facts are as they are recited to be.

In the case at bar it can not be claimed that there has been any record of any decision by Isaac Pearson, Trustee. If he made any, it rests *en pays*. So far from endorsing it upon the bonds so that the purchaser could see whether he had decided at all, and what he had decided, in order to determine the fact, and the extent of the decision, it has been necessary to resort entirely to parol proof. Whether he decided that the word "through" did not mean "through," or whether he decided that it was better for Harrodsburg not to require the railroad to build to Danville; whether he considered that it was to the interest of the county to waive the condition—of all this nor of any of it is there any record whatsoever. And it must be borne in mind, when it is complained that in such a case as this the court must disregard the performance of the condition precedent because it will be difficult for a purchaser to prove its performance, the very argument is bound to admit that it is necessary for him to prove that it has been decided that the condition was performed.

Suppose, in the case at bar, the defendant in error had proved that the railroad had been built through Mercer County, and the plaintiff in error had proved that Pearson had decided that it had not been built through Mercer County—in such a case the defendant in error would hardly have treated a contention that Pearson's decision was binding, in the face of the existence of the physical fact, as a serious contention.

This brings us to consider:

VI.

The Act did not Vest in Isaac Pearson, Trustee, the Power to Decide in Such a Way as to be Binding Upon Mercer County or the Railroad Company whether the Condition Precedent Had Been Performed.

This brings us again to the consideration of the terms of this particular statute.

The statute must be read in the light of decisions construing similar and different enactments. If the Legislature of Kentucky had had before it, when passing this act, the 105th volume of the reported decisions of this court, it would have found two cases illustrating the necessity of protecting municipalities upon the one side and the purchasers of securities upon the other from imposition and loss. The two cases we refer to are Insurance Company v. Bruce, 105 U. S. 328, and Lewis v. The Commissioners, 105 U. S. 739. Reading these cases it would have ascertained from the first of them that if a county was allowed by law to subscribe, with or without the exaction of conditions, and was authorized to issue its bonds prior or subsequent to the performance of such conditions, bonds issued by the county authorities authorized to issue them, containing no recital of the existence of conditions but a recital that the bonds were issued in conformity with the act, would be binding upon the county, even though the conditions had not been performed. This because it would be presumed that "to the end, therefore, that money might be raised for the construction of the proposed road, or in reliance upon the performance by the railroad company of the conditions imposed, the constituted authorities of the town and the officers or agents of the company co-operated in putting out bonds, negotiable in form, with recitals that gave no intimation even that the subscription was conditional. The fact that conditions had been prescribed was omitted in recitals, full of every thing necessary to induce the public to buy bonds."

To prevent such an occurrence the legislature might reasonably have concluded that it was sufficient to make provisions which would avoid the existence of either of those elements which might possibly tend to the deception of a bona fide purchaser of the bonds of the county. This would be accomplished, first, by putting into this act an express declaration that the bonds should not be valid except upon

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the performance of a certain condition; and, second, by taking away from the authorities of the county any power to certify to the performance of this condition precedent by requiring the bonds to be executed immediately upon the making of the subscription, and to be deposited in the hands of some other corporation or individual, to be held until the condition was performed.

The legislature might have learned from Lewis v. Commissioners, 105 U. S. 740, that where bonds were authorized to be issued, with or without conditions, and to be placed in escrow, if issued with conditions, but not to be placed in escrow if there were no conditions, and bonds appeared on the market with full recitals in them such as they would legitimately have from all officers in case no conditions had been imposed in the subscription—such bonds would be valid and binding against the county because the purchaser would have the right to assume that no conditions had ever been imposed, and would have the right, therefore, to conclude that there had been no occasion to deliver them in escrow.

To avoid this the legislature, in the act under consideration, provided, as we have seen, that the bonds should not be issued except subject to the condition precedent, and that in any event they should be delivered to a trustee or trust company, to be held in escrow.

Therefore every purchaser of these bonds knew these three things: that they were not valid unless a certain condition precedent had been performed; that the fact that the county officers had signed the bonds indicated that at the time of such signature the condition had not been performed, and that the bonds had been delivered to a trustee or trust company in escrow.

This brings us, therefore, face to face with the question, Did the legislature mean that this trustee or trust company was to have the power to decide that the condition precedent had been performed in such a way as without any recital of such decision, and the same resting *en pays*, the county must pay these bonds regardless of the truth in reference to the performance of the condition?

The act provides in reference to the bonds, after saying that they shall not be binding or valid obligations until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same—that at such time they shall be delivered to the railroad company in payment of the subscription of such county, and that the county shall thereupon be entitled to receive certificates for the stock subscribed; and "the county judge of such county shall order that such bonds shall be deposited with a trustee or trust company, to be held in escrow and delivered to

the said railroad company when it shall become entitled to the same by the construction of its road through such county; provided, however, that such trust company or trustee shall, before receiving such bonds, give bond, with good surety approved by the county judge, for the faithful performance of his or its duty in the premises."

There can be no doubt that under Young v. Clarendon Township, 132 U. S. 352–3, a municipal bond, like any other instrument, is invalid until it shall have been delivered by some one authorized to deliver it.

This act, while directing the county judge and county clerk to sign these bonds, took away from those officers any power to deliver them, except in escrow. What, then, is the power of a depositary in escrow?

In 1 Devlin on Deeds, p. 290, Sec. 312, it is said that an escrow is a delivery which may be made to a third person conditional on the performance of an act or the happening of an event; whereupon it is to be delivered to the grantee.

Again, at Section 321, p. 300: "Until the condition is performed the deed is of no more force than it would have been if the grantor, after signing and sealing the instrument, had deposited it in his own desk."

Again, at Section 322: "If the depositary deliver the deed without authority to do so from the grantor, or if the grantee obtain it fraudulently, without performing the condition, the deed is void."

This is clearly stated in County v. Emigrant Co., 93 U. S. 127.

In 6 American and English Encyclopedia of Law, page 866, we find the following:

"It is not necessary that the term 'escrow' should be used when an instrument is delivered to a third person, to prevent its taking immediate effect. That term evinces more clearly and distinctly than any other the actual intention of the parties; but where such intention is indicated in any other manner, effect will be given to it, unless the technical or legal phraseology employed by the parties renders it impracticable."

And at page 867 we find the following:

"When a deed is delivered merely as an escrow, to take effect upon the performance of some condition by the grantee in the future, no title passes until the condition has been performed. The transaction is incomplete. It is not the grantor's deed until the second delivery. Even if the grantee obtains possession of it before the condition has been performed, yet it is not the grantor's deed, and he may avoid it by pleading *non est factum*. The grantee can not acquire the title by gaining possession of the deed by theft, by fraud,

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or by the voluntary act of the depositary, but only by performance of the condition. The depositary has no authority to waive such performance, and an unauthorized delivery by him of the deed which he holds in escrow is entirely ineffectual to pass the title. Until the performance of the condition the legal title is in the grantor; and that the condition upon which he was to receive the deed has been performed can not be inferred from the fact that the grantee has the unexplained possession of the deed. Although it is well settled that an escrow delivered without authority, or obtained fraudently, passes no title to the grantee or obligee, there is some conflict of opinion as to the right of an innocent purchaser from a grantee who has obtained possession of the escrow without performing the conditions; but the better opinion seems to be that such a purchaser acquires no title."

Now we do not think it necessary to cite the various cases given in that note and in the other text-books which support the language we have quoted. There is no room, so far as we have been able to find, for the contention that the decision of the depositary is even *prima facie* evidence of the performance of the condition, much less that it is binding. It is the performance of the condition which makes the instrument valid, and not the decision of the depositary. Nor is there any thing unusual in the case at bar in that the county court appointed the depositary. Nine times out of ten the depositary in escrow is appointed by the maker of the instrument.

It is, however, claimed that the rule in regard to a bona fide purchaser of negotiable bonds which have been put in escrow is different from that of a deed to land. But what exactly is meant by this? We submit that this is meant: The negotiable instrument does not carry upon its face any notice that it has ever been in escrow. Therefore if I deliver my negotiable note to a third person in escrow, to be delivered on the performance of the condition, and if my note is obtained from him by force, theft, or fraud, and put upon the market and sold to a bona fide purchaser he can enforce it against me because the negotiable instrument does not bear upon its face any notice to the effect that it has ever been in escrow. But in the case at bar these bonds have in effect a statement upon their very face that they have been delivered in escrow, and are not to be valid or binding until a certain condition has been performed; and there is nothing to represent to the purchaser that this condition has been performed beyond the bare fact that the bonds are in circulation.

We submit that there is no case which holds that the purchaser of a negotiable instrument, with notice that it has been in escrow, takes any title to it unless it also appears as a matter of fact that the condi-

tion has been performed. In other words, there is no difference between the non-negotiable and the negotiable paper delivered in escrow, provided the purchaser has knowledge of the fact that its original delivery was in escrow. Given such knowledge, the purchaser of the negotiable instrument is as much bound to ascertain the fact of the performance of the condition at his peril as is the purchaser of the non-negotiable instrument. In other words, the reason of the law exempting the purchaser of a negotiable instrument from inquiry as to the fact of performance of condition, is that the negotiable instrument does not bear on its face any evidence that it has ever been in escrow. But wherever it does bear such evidence, then the purchaser of the negotiable instrument is bound to ascertain the fact—the very fact—of the performance of the condition.

This court has decided many times in cases above cited that a delivery of negotiable bonds by officers authorized to decide conditions precedent does not in the absence of recitals bind the county.

An effort is made to construe this act as giving this depositary in escrow the power to conclusively decide, because in the first clause of this act Mercer County is authorized to pay for its subscription to the capital stock of the railroad in the negotiable coupon bonds of the county. It is said that the legislature could not have anticipated putting the purchaser upon inquiry as to the performance of this condition precedent when it allowed the county to issue negotiable bonds.

We think we speak with entire accuracy when we say that in all the cases in this court in which it has been held that bonds were void because of the failure to perform conditions precedent, the bonds were, in substance and effect, negotiable bonds.

The ordinary meaning of the word "negotiable" is "transferable by endorsement or delivery." It is contended that the legislature, by the use of this term, meant to provide for the safety of investors if any bonds were in fact delivered, by cutting off the defense of the county. This being the object, it is argued that any construction of the act is to be indulged which accomplishes the purpose. But the use of this word should be in no way a controlling factor in the construction of this act as to the power of the county to execute and issue these bonds.

This is a mere description of the character and quality of the bonds after they have become the valid contracts of the county, and does not make bonds which are invalid binding on the county. In other words, it confers no power not otherwise granted. The power to act must first attach, and is independent of the quality or character of the con-

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tract to be made. The act to be done was to issue negotiable coupon bonds, and the power to do this act was to depend upon the performance of the condition precedent provided in the statute. If the performance of this condition precedent operates as a limitation upon the power to do the act, it controls the doing of the whole act. Until and unless the condition precedent is performed, no power to issue or deliver any bonds is conferred at all. It is the performance of this condition precedent that invests the county with power to act, and it controls the question whether they are in fact bonds; for if they are not bonds, they are not negotiable bonds.

Again, the word "negotiable" was meant to imply a quality in these bonds in their transfer from hand to hand; in the title which one bondholder would get from another bondholder; and did not at all necessarily or reasonably imply that some other provision of the statute—as one that the bonds are not to be the valid obligations of the county in a certain contingency—is to be controlled by the word "negotiable." We submit that this whole argument from the use of the word "negotiable" is answered by the case of Ackley School Dis. v. Hall, 113 U. S. 140.

Again, if the legislature said in the first section "negotiable," it it said in the fourth section "escrow."

The word "escrow" is a technical word—a word of distinct legal significance. Whether accurately applied to bonds or not, in ordinary parlance, the legislature had the right to apply it to these bonds, and in applying it to these bonds must be assumed to have meant to use the word in its legal and technical significance. If not given this meaning, then none can be given—which is not true of the other word.

Indeed, if one, without the history of this case before him and the doubt that is thrown upon even the plainest proposition by ingenious argument, were to sit down to draw an act which would prevent county bonds from binding the municipality until and unless a certain named condition precedent should be actually performed, we believe it would be a most difficult task to find language which would more accurately and fully and completely express that thought than do the terms of this enactment.

It is argued that the bonds were contemplated to be valid if delivered by the trustee or trust company, because the depositary in escrow was required to give bond for the benefit of the railroad company and the county; and, it is said, how can such bond have possibly benefited the county?

It is not difficult to answer this question. In the first place, the county had the right to exact conditions other than those mentioned in

the act, and did in fact exact other conditions. For instance, it required that $20,000 of these bonds should be retained as security against the building of certain machine shops and a round house at Harrodsburg: yet as there was nothing on the face of the act to prevent the trustee from delivering these bonds, upon the performance of the conditions set forth in the act, if he had in fact so delivered the whole $125,000 of bonds after a building of the railroad through Mercer County, the bonds would have been binding upon the county. But the trustee would have been liable for damages in violation of his duty in the delivery of $20,000 of the bonds.

Again, the terms of the subscription gave the railroad five years in which to complete the line through the county. The act required that when the bonds should be delivered upon the performance of this condition, there should be cut from them the matured coupons. Suppose, however, that the trustee, after the performance of the condition, had delivered the bonds without cutting from them these coupons—the county might well have been liable for the coupons, but the trustee would have been liable upon his bond to the county for the failure to perform his duty.

In both the cases which we have supposed the bondholder would have taken the bonds without any notice upon the face of the act that they were invalid, it being assumed that the railroad had been built through Mercer County.

This argument, therefore, must fall to the ground.

Another argument is that it is difficult to tell what is the boundary line of Mercer County. We can hardly believe counsel for defendant in error serious in this proposition. It is no more difficult to tell the boundary line between Mercer County and Boyle County than between Kentucky and Tennessee, or Minnesota and Canada; and yet the courts take judicial notice of the exact position of this boundary line, and questions of the gravest import are dependent upon its being exactly deliminated.

It is to be observed that this act did not even require an individual to be appointed trustee. The language is constantly "trustee" or "trust company." This is another token of the legislative intent to make the depositary in escrow that and nothing else—not a judge, not a decider, but a depositary; one who would keep the bonds safely and would deliver them upon the happening of the event, and retain them until the happening of it.

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VII.

The County is not Estopped by any Other Facts in This Case from Contesting These Bonds.

We submit that there is neither a moral nor a legal estoppel against Mercer County in this case. If the court will examine the findings of the court as shown in Record 28, it will be perceived that the question there was whether this precedent condition of building the railroad through Mercer County should be waived. No doubt there were people in Mercer County, and especially at Harrodsburg, who preferred that this railroad be not carried through Mercer County and Boyle County to Danville, because of the rivalry between these two county towns; and it was easy enough to get a few people about the county-seat to make a great deal of noise on this question. But while considering those who did speak, the court must not be unmindful of the many living all over the county who had no opportunity to speak. Of these, 1,250 had entirely opposed the making of this subscription. It may be easily conjectured that of the 1,683 who voted for it, there would have been found a requisite number to make the minority a majority and the majority a minority if it had been proposed to waive this condition.

As for the County Court of Mercer County, it distinctly entered of record that it had no jurisdiction in the premises, and two members refused to vote at all.

The fact that the county for some years paid interest on these bonds is entitled to no legal weight. The Circuit Court of Appeals has so fully argued this question and cited the authorities upon it that we do not see that it is worth while for us to add any thing further to what that court has said. We refer especially to its opinion found on pages 61 and 62 of this record. The very recent case of Saline County v. Graves, 161 U. S. 373–4, enforces the legal proposition so clearly set out by Judge Lurton.

We respectfully submit that the judgment of the Circuit Court should be reversed, and that of the Circuit Court of Appeals allowed to stand.

Respectfully,

John B. Thompson,
Alexander Pope Humphrey,
Geo. M. Davie,
Counsel.

John W. Hughes,
Of Counsel.

AN ACT TO AUTHORIZE THE COUNTY OF MERCER TO SUBSCRIBE AID TO THE LOUISVILLE SOUTHERN RAILROAD COMPANY.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. That the county of Mercer may subscribe to the capital stock of the Louisville Southern Railroad Company as hereinafter provided, and may pay therefor, in the negotiable coupon bonds of said county, payable not more than thirty years after date, and bearing interest at a rate not to exceed six per centum per annum, payable semi-annually, and which bonds and interest shall be payable at a place designated therein.

Section 2. Whenever application shall be made to the judge of the county court of said county, by a petition of twenty-five resident taxpayers therein, requesting that the question of subscribing to the capital stock of the said railroad company, upon the terms and conditions set forth in said petition, be submitted to a vote of the legal voters of such county, it shall be the duty of the county judge to order an election to be held in such county on a day named therein to ascertain the sense of the legal voters thereof upon the question of making such subscription, and to cause notice thereof to be published in such county in a newspaper published therein not less than ten (10) days, and to be posted at the court house door in such county, and at such other public places therein as he may by order direct; and, at such election, votes shall be received "For the Railroad Subscription," and "Against the Railroad Subscription." Officers of such election shall be appointed and hold such election, and make return thereof to the county judge thereof in the manner provided in ordinary county elections.

Section 3. As soon as may be thereafter, the county judge of such county shall determine if a majority of the legal votes cast at such election were in favor of such subscription, and if they were, he shall thereupon enter an order subscribing in behalf of such county to the capital stock of the said railroad company in accordance with the terms of the proposition voted on, and he shall thereupon cause to be prepared and execute the negotiable bonds of such county as before mentioned, which shall be signed by him as county judge and attested

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by the county clerk, with his official seal affixed thereto, and the coupons shall be signed by said clerk.

Section 4. The said bonds shall not be binding or valid obligations until the railway of the said company shall have been so completed through such country that a train of cars shall have passed over the same, at which time they shall be delivered to said railroad company in payment of the subscription of such county, and the county shall thereupon be entitled to receive certificates for the stock subscribed, and the county judge of such county shall order that such bonds shall be deposited with a trustee or trust company, to be held in escrow, and delivered to the said railroad company when it shall become entitled to the same by the construction of its road through such county: Provided, however, That such trust company or trustee shall, before receiving such bonds, give bond, with good surety, approved by the county judge, for the faithful performance of his or its duty in the premises; And provided further, That no such subscription shall be binding unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg.

Section 5. An annual tax sufficient to pay the interest on such bonds, and the principal, when it shall become due, shall be levied and collected and paid out by the officers of such county, as provided in the case of other county taxes.

Section 6. This act shall take effect from and after its passage.

Approved May 15, 1886.

UNITED STATES OF AMERICA.

$1,000. No. 105.

LOUISVILLE SOUTHERN RAILROAD AID BONDS.
COUNTY OF MERCER, STATE OF KENTUCKY.

The county of Mercer, in the State of Kentucky, hereby acknowledges itself indebted and promises to pay to the Louisville Southern Railroad Company, or bearer, the sum of $1,000 on or before the 10th day of January, A. D. 1917, at the Louisville Banking Company in the city of Louisville, Kentucky, with interest thereon at the rate of five per cent per annum, payable semi-annually at said bank on the 10th days of July and January after date respectively in each year, on presentation and surrender of the annexed coupons representing such interest. This bond is one of a series of one hundred and twenty-five bonds of even date herewith, all of the same denomination and tenor, and numbered consecutively from one to one hundred and twenty-five, the same having been issued pursuant to the authority conferred upon the said county by an Act of the Legislature of Kentucky, entitled "An Act to authorize the County of Mercer to subscribe aid to the Louisville Southern Railroad Company," approved May 15, 1886, and pursuant to an order entered by the county judge of said county in conformity with said act subscribing in behalf of said county for the capital stock of the Louisville Southern Railroad Company in the sum of $125,000, which order was entered of record in said court on January 10, A. D. 1887.

If the county of Mercer shall determine to pay any part of said series of bonds before the end of thirty years after their date, the county judge shall give at least three months' notice of such intention by a publication to be made in a newspaper published in each of the following places, viz., in Harrodsburg and Louisville, Kentucky, and New York City, stating the time when such bonds will be paid, and such call of said bonds shall be made consecutively, and not more than $25,000 of bonds shall be called in one year. Interest on the bonds so called shall cease at the end of three months from the publication of said call, provided the county shall have on deposit at the

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place of payment the amount of money necessary to pay the bonds named in said call.

In witness whereof, the county of Mercer, by John W. Hughes, county judge thereof, has in the name and on behalf of said county subscribed and executed this bond, and the same has been attested by the county clerk of said county with his official seal affixed hereto, and the interest coupons attached thereto have been signed by the said clerk.

Done on the 10th day of January, A. D. 1887.

THE COUNTY OF MERCER, [SEAL.]
By JOHN W. HUGHES,
County Judge.

Attest: BEN. C. ALLIN,
Clerk.

FILED.
APR 6 1898
JAMES H. McKENNEY,
CLERK.

No. 243.

Brf. of Dickson & Bullitt for P. C.

MERCER COUNTY BOND CASE.

Filed April 6, 1898.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 243.

THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY, - - - - - - - - - *Plaintiff in Error,*

VERSUS

THE PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA, - - - - - - - - *Defendant in Error.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF IN BEHALF OF THE PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA.

SAMUEL DICKSON,
THOMAS W. BULLITT,
COUNSEL FOR THE PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA.

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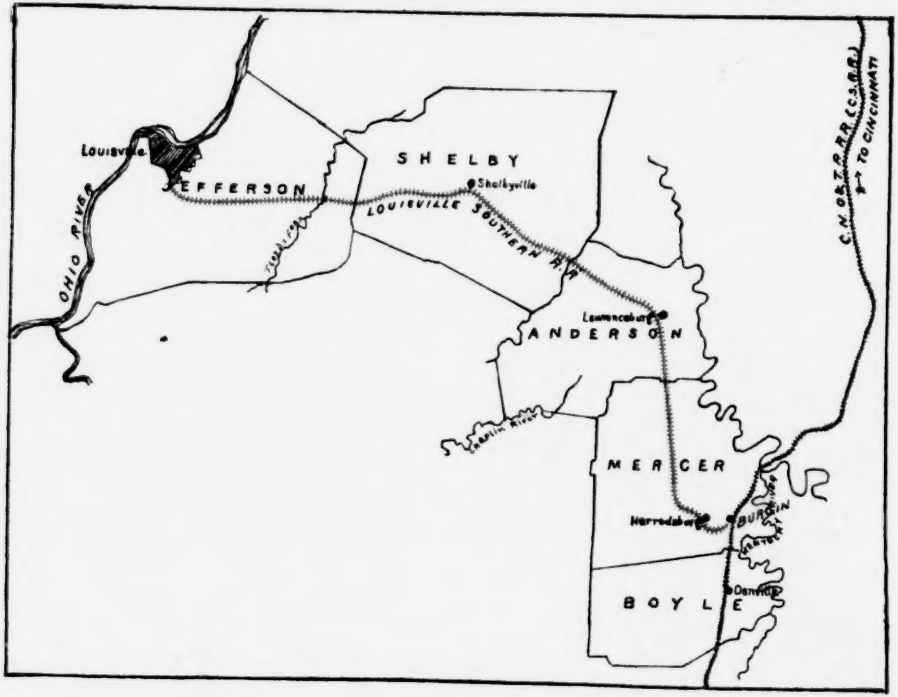
MAP OF LOUISVILLE SOUTHERN R. R. CO., WITH REFERENCE TO MERCER COUNTY.

DISTANCES FIXED BY FINDINGS OF FACT.

RECORD, P. 27.

Anderson County line to Harrodsburg,	15 miles
Harrodsburg to Burgin (S. W. R. R. Co.),	4.72 miles
Total length of Louisville Southern R. R. Co. in Mercer County,	19.72 miles
Louisville Southern R. R. to Boyle County line,	2 miles
Louisville Southern R. R. to Danville (Boyle County),	7 miles



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SAMUEL DICKSON,
THOMAS W. BULLITT,
COUNSEL FOR THE PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897. *No. 243.*

THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY, - - - - - - - - *PLAINTIFF IN ERROR,*

VERSUS

THE PROVIDENT LIFE & TRUST COMPANY OF PHILADELPHIA, - - - - - *DEFENDANT IN ERROR.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF IN BEHALF OF THE PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA.

This action was instituted at law in the United States Circuit Court at Louisville, Kentucky, by the **Provident Life & Trust Company** of Philadelphia, as plaintiff, against the **County of Mercer,** State of Kentucky, as defendant. The case was heard (under a stipulation waiving a jury) before the Hon. John W. Barr as Circuit Judge, who made a special Finding of Facts, and upon the facts so found gave judgment in favor of the plaintiff. A writ of error was prosecuted by the defendant

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to the Circuit Court of Appeals, and the judgment of the lower court was reversed. Thereupon the Provident Life & Trust Company filed in this court its petition for a *certiorari*, which was granted (Record 62), and thus the cause comes on for hearing.

THE ISSUES.

The Provident Life & Trust Company sued upon the coupons annexed to $100,000 of bonds issued by the County of Mercer in part payment for a subscription of $125,000 to the capital stock of the Louisville Southern Railroad Company.

The **County of Mercer** defends upon the ground that the statute, which authorized the issue of bonds, provides that they "shall not be binding or valid obligations until the railway of the said company shall have been *so completed through* such county *that* a train of cars shall have passed over the same;" that this condition precedent has not been performed; *therefore* that the bonds and coupons are void.

For the **Provident Life & Trust Company** it is insisted:

I.

That it purchased the bonds, in the ordinary course of business, from a person who had previously purchased same from the Louisville Southern Railroad Company, paying therefor par and accrued interest ($101,197.22), and without knowledge or notice that any defense against said bonds existed or was claimed to exist.

II.

That the enabling Statute vested in the Trustee, named therein, the power and duty to ascertain and determine, before delivering the bonds, whether the conditions precedent to a rightful delivery thereof by him had or had not then been performed; that he decided they had been performed; and that, in favor of a *bona fide* holder of the bonds, for value, *his decision is conclusive.*

III.

That on the face of the bonds it was represented that they were issued "pursuant" to said enabling Statute; that the railroad was not extended beyond its present terminus at the express desire and request of the County of Mercer; that the county before, at and after the delivery of the bonds, publicly represented and declared that said conditions precedent had been

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fully performed; that it consented to and actively participated with the Trustee in their delivery to the Railroad Company; that it received and still retains as its own the capital stock in payment for which the bonds were issued; that it voted said stock on sundry occasions and on resolutions vitally affecting the organization and general welfare of said Railroad Company; that for several years it levied a tax for and paid regularly the interest on said bonds; and that by said conduct the County of Mercer is *estopped* to question the validity of said bonds.

IV.

That before the delivery of said bonds the railway was, in fact, *completed through* Mercer County *within the meaning and intent of the Statute.*

The Trial Court made the following

SPECIAL FINDING OF FACTS.*

(Rec. 16-33.)

In dealing with this finding of facts we have endeavored to arrange the facts chronologically, thus in some measure displacing the order adopted by the Circuit Court.

*The italics used here and elsewhere are ours.

The court finds:

1. That the County of Mercer subscribed for $125,000 of the capital stock of the Louisville Southern Railroad Company (Rec. 20–21), pursuant and subject to the conditions of the following Act of the General Assembly of the State of Kentucky, to wit: (Rec. 16–33.)

CHAPTER 1159.

AN ACT TO AUTHORIZE THE COUNTY OF MERCER TO SUBSCRIBE AID TO THE LOUISVILLE SOUTHERN RAILROAD COMPANY.

Be it Enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. That the county of Mercer may subscribe to the capital stock of the Louisville Southern Railroad Company as hereinafter provided, and may *pay therefor* in the *negotiable coupon bonds* of said county, payable not more than thirty years after date, and bearing interest at a rate not to exceed six per centum per anuum, payable semi-annually, and which bonds and interest shall be payable at a place designated therein.

SEC. 2. Whenever application shall be made to the judge of the county court of said county, by a petition of twenty-five resident tax-payers therein, requesting that the question of subscribing to the capital stock of the said railroad company, upon the terms and conditions set forth in said petition, be submitted to a vote of the legal voters of such county, it shall be the

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duty of the county judge to order an election to be held in such county on a day named therein to ascertain the sense of the legal voters thereof upon the question of making such subscription, and to cause notice thereof to be published in such county in a newspaper published therein not less than ten (10) days, and to be posted at the court-house door in such county, and at such other public places therein as he may by order direct; and, at such election, votes shall be received "For the Railroad Subscription," and "Against the Railroad Subscription." Officers of such election shall be appointed and hold such election, and make return thereof to the county judge thereof in the manner provided in ordinary county elections.

SEC. 3. As soon as may be thereafter, the county judge of such county shall determine if a majority of the legal votes cast at such election were in favor of such subscription, and if they were, he shall thereupon enter an order subscribing in behalf of such county to the capital stock of the said railroad company in accordance with the terms of the proposition voted on, and he shall thereupon cause to be prepared and execute the negotiable bonds of such county as before mentioned, which shall be signed by him as county judge and attested by the county clerk, with his official seal affixed thereto, and the coupons shall be signed by said clerk.

SEC. 4. The said bonds shall not be binding or valid obligation *until* the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same, at which time they *shall be delivered* to said railroad company in payment of the subscription of such county, and the county shall thereupon be entitled to receive certificates for the stock subscribed, and the

county judge of such county shall order that such bonds shall be deposited with a *trustee* or trust company, to be held in escrow, and *delivered* to the said railroad company *when* it shall become *entitled* to the same by the construction of its road through such county: *Provided, however*, That such trust company or trustee shall, before receiving such bonds, *give bond*, with good surety, approved by the county judge, for the *faithful performance of his or its duty* in the premises: And provided further, That no such subscription shall be binding unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg.

SEC. 5. An annual tax sufficient to pay the interest on such bonds, and the principal, when it shall become due, shall be levied and collected and paid out by the officers of such county, as provided in the case of other county taxes.

SEC. 6. This act shall take effect from and after its passage.

Approved May 15, 1886.

2. That said subscription was made likewise pursuant to an Order of the Mercer County Court, confirmed by an election of the people as provided for in the Act; said Order extending the condition precedent, as prescribed by the Act, as follows:

> "The Louisville Southern Railroad Company shall comply with the conditions of the subscription herein contemplated *within five years* from the time any subscription is made, else said subscription to be void and bonds cancelled." (Rec. 18.)

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3. That pursuant to said Act and contract of subscription the County caused its 125 bonds for $1,000 each (aggregating $125,000) to be executed in the following form: (Rec. 7, 22, 23.)

"UNITED STATES OF AMERICA.

"$1000. No. 105.

"LOUISVILLE SOUTHERN RAILROAD AID BONDS.

"*County of Mercer, State of Kentucky.*

"The County of Mercer, in the State of Kentucky, hereby acknowledges itself indebted and promises to pay to the Louisville Southern Railroad Company, or bearer, the sum of $1000 on or before the tenth day of January, A. D. 1917, at the Louisville Banking Company in the city of Louisville, Kentucky, with interest thereon at the rate of five per cent per annum, payable semi-annnally at said bank on the tenth days of July and January after date respectively in each year, on presentation and surrender of the annexed coupons representing such interest. This bond is one of a series of one hundred and twenty-five bonds of even date herewith, all of the same denomination and tenor, and numbered consecutively from one to one hundred and twenty-five, the same *having been issued pursuant to the authority conferred upon the said county by an Act of the Legislature of Kentucky*, entitled 'An Act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railroad Company,' approved May 15th, 1886, and *pursuant to an order entered by the county judge* of said county in conformity with said Act subscribing in behalf of said county for the capital stock of the

Louisville Southern Railroad Company in the sum of $125,000, which order was entered of record in said court on January 10th, A. D. 1887.

"If the county of Mercer shall determine to pay any part of said series of bonds before the end of thirty years after their date, the county judge shall give at least three months' notice of such intention by a publication to be made in a newspaper published in each of the following places, viz., in Harrodsburg and Louisville, Kentucky, and New York City, stating the time when such bonds will be paid, and such call of said bonds shall be made consecutively, and not more than $25,000 of bonds shall be called in one year. Interest on the bonds so called shall cease at the end of three months from the publication of said call, provided the county shall have on deposit at the place of payment the amount of money necessary to pay the bonds named in said call.

"*In Witness Whereof*, The county of Mercer, by John W. Hughes, county judge thereof, has in the name and on behalf of said county subscribed and executed this bond, and the same has been attested by the county clerk of said county with his official seal affixed hereto, and the interest coupons attached thereto have been signed by the said clerk.

"Done on the tenth day of January, A. D. 1887.

"THE COUNTY OF MERCER, [SEAL]

"By JOHN W. HUGHES,

"Attest: "*County Judge.*

"BEN C. ALLIN,

"*Clerk.*"

4. That pursuant to said Act, D. L. Moore was on February 7, 1887, appointed by the judge of the Mercer County Court as Trustee to

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receive, hold, and deliver said bonds as required by Section 4 of the Act (Rec. 23); that said Moore accepted the trust and gave bond with approved surety that he would "faithfully perform his duty as Trustee as aforesaid in the premises" (Rec. 23); and the bonds accordingly on March 3, 1887, were deposited with him. (Rec. 22, 23.)

5. That before June 1, 1888, the railway was constructed and completed from Louisville, in Jefferson County, to and "through" the County of Mercer, from a point on its north (or Anderson County) line towards its south (or Boyle County) line to Harrodsburg, the county seat; that there it was connected with the short line of railroad extending from Harrodsburg to Burgin, on the Cincinnati Southern Railroad; that this connecting line was purchased and owned by the Louisville Southern Railroad Company, and by consolidation was made a part of its railway (Rec. 26); the following distances being fixed by said Finding of Facts:

From the Anderson County line to Harrodsburg, 15 miles; from Anderson County line

to Burgin, 19.72 miles; from Burgin to Boyle County line, 3 miles; from the nearest point on the railroad to the south (or Boyle County) line of Mercer County, 2 miles. (Rec. 27.)

6. That on June 1, 1888, "a train of cars moved by a steam engine passed over said railroad from Louisville through Harrodsburg to Burgin," returning the same day, and that since that date the said "railroad from Louisville through Harrodsburg to Burgin has been continuously operated as the Louisville Southern Railroad." (Rec. 26.)

7. That "the railroad thus constructed gave a railroad connection by the Cincinnati Southern Railroad either northeast to Cincinnati, Ohio, or southwest to Chattanooga, Tennessee." (Rec. 27.)

8. That "about the time of the passage of the train of cars of said road from Louisville to Burgin, and for some time thereafter (that is, after June 1, 1888) there arose a question of whether the conditions precedent to the delivery of $105,000 of the bonds of the county had

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been complied with by the Louisville Southern Railroad Company. There was some difference of opinion among the taxpayers in said county upon this question, and the trustee, Moore, had doubts as to whether he could properly deliver these bonds, but there was no formal demand made upon or refused by him before his resignation as trustee. This question of whether the railroad must be built from one line of the county to another was publicly and generally discussed." (Rec. 27.)

9. That "while this discussion (that mentioned above in paragraph No. 8) was going on and before Pearson, Trustee, had determined that the condition precedent had been performed, and that he would deliver $105,000 of the bonds, the Louisville Southern Railroad prepared to extend its railroad toward and to the town of Danville, Boyle County, which was 7.47 miles distant from Harrodsburg, by acquiring the rights of way with one exception to the Mercer County line." (Rec. 27.)

10. That "there was a movement made to have the Court of Claims of said county instruct the

trustee as to his duty in the premises, and that court, consisting of the county judge and the justices of the peace of said county, met on the 26th of June, 1888, and a full discussion was had before said court, which consisted of the County Judge, Hon. John W. Hughes, and all of the justices of the peace of said county. The court after argument declined, as a court, to instruct the trustee as to his action, but upon motion of one of the justices they passed and had spread upon the records this resolution, viz:

> "The members of this court do not believe that they have any right to enter an order directing the trustee to deliver the bonds of this county to the Louisville Southern Railroad, but as individuals they are of *opinion* that such *delivery should be made* and the construction of the railroad *not forced to the Boyle County line.*" (Rec. 28.)

11. That after this action of the county court and during the discussion aforesaid, to wit, on July 3, 1888, D. L. Moore presented his resignation as Trustee in the following letter: (Rec. 24.)

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"JULY 2, 1888.

"*To the Judge of the County Court of Mercer County:*

"Not being able, even with the advice of the best legal lights in this section, to make plain my duties as trustee of the Mercer County bonds, voted in aid of the Louisville Southern Railroad, and fearing to assume a duty not plainly laid down by the Act or the contract, I prefer to return the trust and deliver back the bonds in my custody rather than to proceed in the dark, and hereby tender my resignation.

"(*Signed*) D. L. MOORE."

12. That on July 3, 1888, the resignation of Moore was accepted, and L. D. Pearson was by order of the county court appointed in his stead as Trustee, "to hold said bonds and deliver same to the Louisville Southern Railroad Company" when the latter should have "complied with" the conditions precedent prescribed in the authorizing Act and the contract of subscription thereunder (Rec. 24), and that Pearson executed bond with approved surety, "faithfully to perform his duty" as Trustee. (Rec. 25.)

13. That "Pearson, Trustee, after his acceptance of this trusteeship DECIDED THE CONDITIONS PRECEDENT HAD BEEN PERFORMED by the Louisville Southern Railroad Company and

WAS ENTITLED TO THE DELIVERY of $105,000 of the bonds of Mercer County" (Rec. 28); also that a certain bond of indemnity was given to Pearson; but it was "given to satisfy the sureties of Pearson and not to influence his judgment or action in deciding the condition precedent had been performed by the Louisville Southern Railroad Company." (Rec. 33.)

14. That pursuant to his said decision Pearson, Trustee, "on the — day of August, 1888, did deliver said bonds in the presence of Hon. John W. Hughes, County Judge of said County, and that the past due coupons on said bonds were cut off before delivery and were burned in the presence of said Hughes, and that there was delivered to said County at the time of delivery of said bonds a certificate for $105,000 of the capital stock of the Louisville Southern Railroad Company." (Rec. 28-29.)

15. That said capital stock was "accepted by said county," was thereafter "voted" by it on a number of most important resolutions (vitally affecting the organization and welfare of the Louisville Southern Railroad Company),

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and is still retained by said county. (Rec. 29–30.)

16. That the "County of Mercer regularly levied an annual tax to meet the semi-annual interest on said bonds and paid interest thereon for the years 1889, 1890, and 1891, and the interest due January 1, 1892, and have not paid any interest on said bonds since that time." (Rec. 30.)

17. That the "Provident Life & Trust Company was, at the institution of this suit, a *bona fide* holder for value of the bonds mentioned to the extent of $100,000, with the coupons thereon, having purchased same of the Investment Company of Philadelphia, and in that city, at par and accrued interest amounting to $101,197.22, without knowledge or notice of any defects, either in the execution or delivery of same, or of any defenses the County of Mercer has or might present to the recovery of same." (Rec. 33.)

ADDITIONAL FACTS ADMITTED BY THE PLEADINGS.

Under the Kentucky Code of Practice, which governs this action, any material facts alleged in the pleadings, if not specifically controverted, are conclusively presumed to be true. (Ky. Code, Sec. 126.)

In the petition it is alleged that Pearson, Trustee, *after he had been requested* by the railroad company *to deliver* the bonds,

"Notified the County Judge of said County, and notified the County Court, as composed of said judge and the magistrates of said County, of the demand which had been made upon him;" of

"His expectation and purpose to deliver the same unless directed or requested by said County Court or County Judge to withhold the delivery thereof;" that the County Court and County Judge

"Had full knowledge and notice of the extent to which and the direction in which said railroad had been constructed into and through said County of Mercer;" and yet that

"Neither the said County Judge nor said County Court made objection to the said delivery, but assented thereto and received for and on behalf of said County, and said County

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now holds said certificates for 1,050 shares of the capital stock of said Louisville Southern Railroad Company." (Rec. 9.)

These allegations are admitted by the answer, with the single exception that the county affirmatively "assented thereto." (Rec. 11.)

ARGUMENT.

Excepting real estate, it is probable that negotiable corporate bonds constitute the largest investments in this country. Of these, municipal bonds are the more important, as they are a favorite investment of persons unskilled in business who rely upon their public or governmental character as a voucher for their safety.

At the same time, because the personal credit of officials is not involved, we find occasionally the most unjust and unconscionable defenses interposed against the payment of municipal bonds.

The validity of such bonds has been frequently tested in this Court. The result is a long line of decisions wherein rules of clear and easy application have been laid down for the guidance of purchasers of municipal bonds.

These decisions have been so lucid, so forcible, and so consistent that they may well be regarded as **constituting a rule of property** in respect to such bonds.

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On the faith of those decisions the bonds in controversy were purchased: it is believed that tested by them, the bonds are valid securities.

That the Circuit Court of Appeals, in declaring the bonds void, has departed from and disregarded certain settled rules of statutory construction announced by this court, we now undertake to establish.

The following, we submit, is a correct and full statement (in so far as applicable to this controversy) of the

RULES OF STATUTORY CONSTRUCTION SETTLED BY THE SUPREME COURT:

I.

All persons dealing with municipal bonds are charged with notice of the **Constitution** and **Statutes** of the State under the authority of which such bonds purport to be issued.

Knox v. *Aspinwall*, 21 How. 539, 544.
Lake County v. *Graham*, 130 U. S. 674, 680.
Barnett v. *Denison*, 145 U. S. 135, 139.

II.

In every case of statutory authority to issue *negotiable* municipal bonds, it will (in the absence of express words to the contrary) be **conclusively presumed** that the statute **intends to establish and does establish** some standard of evidence or some authority whereby a purchaser may **ascertain clearly and authoritatively, at the time of the purchase,** whether the conditions exist or have been performed which justify their lawful issue.

The absence of such a provision in a statute would nullify its declaration that the bonds are to be "negotiable."

Knox v. *Aspinwall*, 21 How. 539, 544.
Bissell v. *Jeffersonville*, 24 How. 287, 299.
Coloma v. *Eaves*, 92 U. S. 484, 487, 488.

III.

If a statute authorizing the issue of negotiable bonds, upon the performance of some condition precedent, shall (in lieu of the decision of some officer or tribunal) designate some fixed **standard of evidence** on the subject, such as

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a **public record** or the like, then purchasers of bonds are bound to resort for information to such **standard of evidence** and can not plead as against the municipality, either representations by its officers or a decision by any alleged tribunal.

Sutliff v. *Lake County Com'rs*, 147 U. S. 230, 235.
Dixon Co. v. *Field*, 111 U. S. 83, 93.
Lake County v. *Graham*, 130 U. S. 674, 683, 684.
Buchanan v. *Litchfield*, 102 U. S. 278, 289–292.

IV.

But if some other standard of authority be not designated by the Act, then the **person or persons** whose duty it may be to execute and deliver or ultimately to **deliver** the bonds will be **conclusively presumed** to be the tribunal designated by law to "ascertain and determine" whether the conditions have been performed which justify the issue of the bonds as negotiable securities.

The duty to make delivery of negotiable securities upon the performance of a condition precedent, involves and implies exactly the same necessity to ascertain and determine

whether the condition has been performed, as if the depository was expressly required to so determine.

Oregon v. *Jennings*, 119 U. S. 74, 92.
Coloma v. *Eaves*, 92 U. S. 484, 487–489.
Lewis v. *Commissioners*, 105 U. S. 739, 749.
Knox v. *Aspinwall*, 21 How. 539, 544.
Bissell v. *Jeffersonville*, 24 How. 287, 298, 299.
Andes v. *Ely*, 158 U. S. 312, 324.
Bernards Township v. *Morrison*, 133 U. S. 523, 527, 528.

V.

On behalf of *bona fide* purchasers for value a **decision** by such statutory tribunal that all conditions precedent have been performed is **conclusive** and **estops** the municipality from disputing the fact.

See authorities cited under No. IV, *supra*. See especially

Coloma v. *Eaves*, 92 U. S. 484, 491.
Marcy v. *Oswego*, 92 U. S. 637, 639.
Chaffee v. *Potter*, 142 U. S. 355, 364.

VI.

A **recital** by the statutory tribunal in the bonds that they are issued **pursuant** to the authorizing statute, is **sufficient evidence** to a

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bona fide purchaser that such **decision** has been made and concludes the municipality.

Andes v. *Ely*, 158 U. S. 312, 324.
Knox v. *Aspinwall*, 21 How. 539, 545.
Oregon v. *Jennings*, 119 U. S. 74, 93.
Insurance Co. v. *Bruce*, 105 U. S. 328, 332.
Livingston County v. *Portsmouth Bank*, 128 U. S. 102, 127.
Pana v. *Bowler*, 107 U. S. 529, 539, 540.
See also cases cited under Nos. IV and V, *supra*.

The estoppel, however, is created by and depends upon the **decision** and not upon the **recital**; the recital being only **evidence** of the decision.

Marcy v. *Oswego*, 92 U. S. 637, 639.
Knox v. *Aspinwall*, 21 How. 539, 545.
Bissell v. *Jeffersonville*, 24 How. 287, 299.
Coloma v. *Eaves*, 92 U. S. 484, 490, 491.
Kenicott v. *Supervisors*, 16 Wall. 452, 464.

VII.

If a municipal corporation is authorized to issue **negotiable** bonds, **provided** that certain **conditions precedent** have been complied with, and if it shall cause to be **recited** in such bonds or **shall otherwise represent** that such conditions have been performed, the municipality is

afterwards **estopped** to dispute the fact. [*See authorities cited under Nos. IV and V, supra*, pp. 22, 23.]

See also

Pendleton Co. v. *Amy*, 13 Wall. 297, 304–5.
Supervisors v. *Schenck*, 5 Wall. 772, 780.
Ray v. *Vansycle*, 96 U. S. 675, 687–8.
Meyer v. *Muscatine City*, 1 Wall. 384, 393.
Bissell v. *Jeffersonville*, 24 How. 287, 300.
Zabriskie v. *Cleveland, &c.*, 23 How. 400.
Moran v. *Commissioners*, 2 Black. 916.

On the faith of these rules petitioner made its purchase, and by them it is now proposed to test its rights and the decision of the Circuit Court of Appeals.

The positions affirmed on behalf of the Provident Life & Trust Company on pages 3, 4, *supra*, will be considered in their order.

FIRST POINT.

The Provident Life & Trust Company is a bona fide holder of the bonds for value without notice of defect or infirmity therein.

This point admits no further argument than that it is found as a fact by the trial court. (Rec. 33.) That finding concludes all parties. (*Runkle* v. *Burnham*, 150 U. S. 216, 225.)

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SECOND POINT.

The enabling statute vested in the Trustee, named therein, the power and duty to ascertain and determine, before delivering the bonds, whether the conditions, precedent to a rightful delivery thereof by him, had or had not then been performed; he decided they had been performed; and in favor of a *bona fide* holder of the bonds his *decision is conclusive.*

The Opinion of the Circuit Court of Appeals rejects this contention on the following grounds:

1. That the positive language of the authorizing statute *does not vest in the trustee* (named therein) the *power or duty to decide* whether or not the conditions precedent have been performed, upon the performance of which depends his duty to deliver the bonds, as *negotiable* securities, to the railroad company. (Rec. *page 63.)

2. That if such power may be inferred from the general language of the Act, yet the accompanying direction that the trustee is to hold the bonds "*in escrow*" qualifies it and shows that the vesting of such power was not within the legislative intent. (Rec. *page 65.)

3. That even if such power or duty *was* vested in the trustee, yet his decision is *ineffectual* because it is *not recited in* or *endorsed* upon the bonds themselves. (Rec. *page 60.)

The correctness of these positions will be considered in their order.

We maintain:

1. *The positive language of the Act does impose on the Trustee the duty and power of* **ascertaining** *and* **deciding** *before making delivery of the bonds, whether the conditions precedent to a lawful delivery by him have been performed.*

Waiving for the present the alleged limiting effect of the words "*in escrow*," we direct attention to the positive language of the Statute.

The *first* and *fourth* sections are alone material to this discussion.

The *first* section provides that the county may subscribe for capital stock and "*pay therefor* in the *negotiable* coupon bonds of said County."

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The *fourth* section provides:

> "The said bonds shall not be binding or valid obligations *until* the railway of the said company shall have been *so* completed through such county *that* a train of cars shall have passed over the same, at which time they *shall be delivered* to said railroad company in payment of the subscription of such county, . . . and the County Judge of such county shall order that such bonds shall be deposited with a *trustee* or trust company, to be held in escrow, and *delivered* to said railroad company *when* it shall become *entitled* to the same by the construction of its road through such county: *Provided*, however, that such Trust Company or Trustee shall, before receiving such bonds, give bond, with good surety, approved by the County Judge, *for the faithful performance of his or its duty* in the premises."

We are to inquire what are the purpose and effect of these provisions of the Act.

It is submitted as perfectly clear that the declaration that the "bonds shall not be binding or valid obligations until," etc., *simply creates a condition precedent* to their lawful delivery.

If an issue of bonds is authorized, conditioned, however, upon the previous performance of a certain act, their issue before such performance

is unauthorized, and it necessarily follows that the bonds are void. Nothing is added to the force of the prohibition by declaring that in such case they shall not be valid or binding.

We are called, therefore, to deal with the simple case of bonds alleged to have been issued before the performance of a condition precedent—a case frequently considered by this court.

The language of the Act, if not controlled by the words "in escrow," fulfills every requirement of the rule which "conclusively presumes" that a Trustee, holding "negotiable" bonds, to be delivered upon a certain condition, is vested with power to decide finally whether or not that condition has been performed.

It is a *fundamental purpose* of the Act, that the bonds to be issued under it shall be *negotiable* bonds. They were to be used in payment for stock, and it is expressly declared that the bonds so used shall be "negotiable coupon bonds." The railroad company was not obliged to receive nor was the county entitled to offer in payment any but its negotiable bonds. If, therefore, the bonds should ever be issued they must, *when delivered*, be *negotiable* bonds.

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What is meant by negotiability? Clearly that the County, as maker of the bonds, should not, after their delivery by the lawful custodian, be able to make defense against them in the hands of a *bona fide* holder for value. If after such delivery of the bonds, in payment of the stock subscription, and their transfer to a *bona fide* purchaser, it should remain *always* competent to the county to defend upon the ground that certain conditions precedent had not been performed, as for example that a train of cars had not passed over the road before June 1, 1888, or that the road was not in a complete condition, then clearly the bonds *would not be negotiable.* The right to such defense contradicts the very idea of negotiability.

We ask attention to the clear and able presentation of this view by His Honor, Judge Barr. (Rec. 35.)

It follows inevitably, from the rule of statutory construction established by this court (as mentioned in Clause II, page 21, *supra*), that, in the absence of express words showing that there was no real purpose to make the

bonds negotiable, the Statute *intends to establish* and *does establish* some standard of evidence or some authority whereby a purchaser may *ascertain, clearly and authoritatively, at the time of purchase*, whether the conditions exist or have been performed which justify their issue—that is, whether the conditions precedent have been performed.

Critically examining the Act, what appears on this subject?

There are several conditions precedent to a lawful issue of the bonds.

The first is that a majority of the legal voters of the county shall have voted in favor of the subscription.

The determination of that question is expressly committed to the County Judge. To that extent we find the rule, as expressed by this court, clearly illustrated by the Act. With that point, however, the Trustee had no concern. It was to be and was decided before the bonds came into his hands.

The conditions precedent (if indeed there be more than one) upon which depended the right

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and duty of the Trustee to make delivery, were: (1) That the railroad should be "completed through such county." (2) That a "train of cars" should theretofore have passed over it prior to January 10, 1892, conditions indissolubly joined in a single sentence, viz: that the railway "shall have been so completed through such county that a train of cars shall have passed over same."

Knowing it was the legislative intent that a purchaser of the bonds could, when they were offered for sale, *ascertain clearly and certainly* whether these conditions had been performed and that the Act *provides a method* for so doing, it remains to inquire: **What is that method?**

No officer or tribunal, unless it be the Trustee, is authorized to decide the question. Neither the County Judge nor any county official was entrusted directly or indirectly with that power or duty. The bonds were placed in the hands of a trustee for the plain reason that it would not have been just to the railroad company to leave so grave a question to one of the parties to the contract.

If, then, the Trustee be not empowered to decide the question, it must be because *some other* fixed and certain standard of evidence, such as a public record or the like, is provided by the Act for the ascertainment and permanent preservation of the facts.

In *Dixon* v. *Field*, 111 U. S. 83, and in *Lake Co.* v. *Graham*, 130 U. S. 683–4, there was a *record*, which would have enabled any purchaser to ascertain certainly that the bonds were issued in violation of law.

But looking into this Act we utterly fail to find any provision for such ascertainment or record. The Act contains no requirement that the railroad company shall certify to the county court or to any court or officer that a "train of cars has passed" over its road; nor that the county or any official shall witness or make record of the fact. If a decision of the fact be not required of the Trustee, *then no provision is made* for its ascertainment; and a purchaser of the bonds must take them, if at all, at the peril of having the question raised five, ten, or twenty years after his purchase:

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when, perhaps, all evidence of the facts has been forever lost. It is probable that, at this time, the death of one or two persons would render any certain proof on the subject impracticable. To call such bonds "negotiable" is a mere trifling with words.

But it is insisted that the question at issue relates not to the "passage of a train of cars" over the road but to a completion of the road "through" the county—a very different question.

Even if those were two distinct conditions, still, indissolubly joined as they are in the Act, it will not, in the absence of express words, be presumed that the Trustee was invested with the duty of deciding the one and excluded from a right of decision as to the other. In fact, however, there is but one condition; the road must have been "*so* completed . . . *that* a train of cars shall have passed," etc. Completion of the road and the passage of a train are part and parcel of a single condition. The passage of the train is a component part, the essential and sole evidence, of completion. However the road might have been constructed,

to whatever point it might have been extended, until a train of cars had already passed over it, it would not have been "so completed" as required by the statute. To insist, therefore, that the Trustee was to decide conclusively as to one and was excluded from decision as to the other branch of the same condition seems to border upon the absurd.

But if it be conceded that these are severable conditions, still the question of "completion through the County" is clearly not less *in pais* than the other condition.

We waive the point that what constitutes "completion" of a railroad (if severed from the agreed evidence that a train of cars has passed over it) is a question of comparison and largely of opinion of which a "record" evidence is impossible.

The question whether the road, at a given date, had been extended "through the County of Mercer," to its *south line*, is one which can not be determined by any statute or known record.

It is, indeed, argued that the Statutes fixing the boundaries of Mercer County are presump-

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tively known to all persons. Conceding it, those boundaries are presumptively known to the courts. Yet if a controversy should arise between land owners over a division line, their tracts being separated by a county line, it would be a bold court which should attempt to settle the controversy by the statute and without a survey of the county line. But knowledge obtained by a survey has no analogy to the information contained in a record. Nothing is more common than a difference between the results obtained by surveyors. Knowledge of the Statutes, even if they accurately defined the boundaries, would not convey knowledge of the topography of the county.

But the fact is, the Statute defining the present south boundary of Mercer County gives absolutely no clear or certain indication of its location or direction. It was fixed by an "Act to establish the County of Boyle and for other purposes," approved February 15, 1842.

Its material sections are as follows:

"SECTION 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky*, That from and after the first day of March next all those parts of

Mercer and Lincoln counties within the following boundaries, to wit: beginning at the point where the Casey, Mercer, and Lincoln lines meet; thence running a direct line to *Shelby's meeting house*, in Lincoln County; thence in a direct line to the *five-mile tree* on the main road leading from Danville to Stanford; thence a direct line to the mouth of Street's branch in the Hanging Fork; thence with the meanders of and down said fork to its mouth in Dick's River; thence down and with said river to a point thereon from which a due east and west line therefrom will include the *house, yard, and garden of the late Judge Boyle*, now owned and occupied by Robert Tilford, in Mercer County; thence from said point said due east and west line so as to include said house, yard, and garden; thence in a direct line to the *bridge across Harrod's Run*, on the turnpike road from Danville to Harrodsburg; thence to the *bridge across the Dry Fork* of Chaplin on the turnpike road from Perryville to Harrodsburg, and continuing the same course to the Washington County line; thence with the Washington and Marion east county lines to the north Casey line; thence with the Casey County line to the beginning, shall be, and the same is hereby, stricken from Mercer and Lincoln counties and erected into one distinct and separate county, to be called Boyle, in honor of Kentucky's distinguished jurist, John Boyle.

"SEC. 7. That the *surveyor of Garrard County* shall be, and he is hereby, appointed commissioner, with such assistants as he may deem necessary to employ, to *run and mark* the boundary lines of said county of Boyle, who shall be allowed three dollars per day for his services whilst engaged, and two dollars per day shall be allowed to each of the persons he may engage to assist him, payable out of the county levy of said county of Boyle."

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It is to be observed:

First. The Act recognizes that an actual *survey* is essential to fix the line, and the surveyor of *Garrard* County is directed to make the survey.

Second. The act points out no officer to whom the survey shall be returned; makes no provision for its record, and gives no direction as to how the line shall be marked.

Third. The Act gives no calls or distances, and now, after fifty-five years, it can not be judicially presumed that the "five-mile tree," "Shelby's meeting house," "house, etc., of the late Judge Boyle," and the various "bridges" are still standing or that a stranger would recognize them if found.

A person, by following the Act alone, and without other information, could not now make a new survey for himself and thus determine the county line.

If these landmarks could be ascertained, it would still require a survey to locate the line, and a survey is distinctly a matter *in pais.* It must be established by the testimony of the surveyor. *It does not prove itself as a record does.*

It thus appears, that, *unless by a decision of the Trustee*, the Statute prescribes *no method* whereby a purchaser of the bonds could ascertain, certainly and conclusively, whether the conditions precedent to their lawful issue had or had not been performed. He must purchase at the peril of having the question of their validity always open—even to the date of their maturity. If so, the bonds are not negotiable.

If the Statute really designed to make them negotiable, it follows conclusively that it vests in the Trustee the right and duty to decide finally whether the conditions precedent had or had not been performed.

In rejecting this conclusion the Circuit Court of Appeals rests its opinion upon the following grounds, independent of the qualifying effect of the words "in escrow," viz:

(*a*) "If he (the trustee) is empowered to make any determination whatever, the power is only *inferentially* granted" (Rec. *page 63);

(*b*) But this inference can not be indulged because the Act makes no provision "requiring an *indorsement* of such decision on the bonds, or the making of some other permanent record

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that so grave a determination had been made" (Rec. *page 63);

(*c*) And because the trustee was not the *agent* of the county; consequently it was not "intended that he should conclude the county through any agency for or in relation to it." (Rec. 58.)

We submit that at every step the opinion is in conflict with the decisions of this Court.

In respect to an "inferential" grant of power, it need only be observed that in the long line of decisions from *Knox* v. *Aspinwall* to *Andes* v. *Ely*, in no instance (except *Chaffee* v. *Potter*, 142 U. S. 355, 362, and *Lewis* v. *Commissioners*, 105 U. S. 739, 742) was the official, whose decision was accepted as conclusive, charged in express words with the duty or power of making such decision. That power was invariably "inferred" from the fact that the designated official was charged with the duty of delivering negotiable bonds upon the performance of certain conditions precedent, and that *no other provision was made* for determining whether and when they had been performed.

The point was expressly raised and decided in *Knox* v. *Aspinwall*, 21 How. 539, 544; *Bissell* v. *Jeffersonville*, 24 How. 287, 298, 299, and *Oregon* v. *Jennings*, 119 U. S. 74, 92.

In *Coloma* v. *Eaves*, 92 U. S. 484, 489, the Court, quoting and approving *Commissioners* v. *Nichols*, 14 Ohio St. 260, say:

> "A statute, in providing that county bonds should not be delivered by the commissioners until a sufficient sum had been provided by stock subscriptions to complete a certain railroad, and imposing upon them the duty of *delivering* the bonds when such provision had been made, without indicating any person or tribunal to *determine* that fact, *necessarily delegates that power* to the commissioners; and if delivered improvidently the bonds will not be invalidated."

In the case at bar the statute imposed upon the Trustee the duty of delivering the bonds *when* the conditions precedent were performed, without otherwise indicating any person to determine that fact; it follows that the statute "necessarily delegates" the power of decision to the Trustee.

In the same case, at page 488, it is said:

> "At some time or other it is to be ascertained whether the directions of the act have been fol-

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> lowed. The *duty of ascertaining* was plainly intended to be *vested somewhere*, and *once for all;* and the *only persons* spoken of, who have any duties to perform respecting the election and action consequent upon it, are the town clerk and the supervisor. . . . *It is a fair presumption*, therefore, that the Legislature *intended* that those officers, or one of them at least, should *determine* whether the requirements of the act . . . had been met."

In *Bernards Township* v. *Morrison*, 133 U. S. 523, 527, 528, Mr. Justice BREWER said:

> "It is urged . . . that the statute does not *in terms* give them authority to determine whether the preliminary conditions have been complied with.
>
> "While it is true that the act does not in terms say that these commissioners are to decide that all preliminary conditions have been complied with, yet *such express direction and authority is seldom found in acts providing for the issuing of bonds. It is enough that full control in the matter is given to the officers named.*"

The second objection, that the Act *makes no provision* that the Trustee's decision should be "endorsed" upon the bonds, or otherwise made a matter of record, is equally untenable.

This, indeed, is a most startling innovation upon the law governing these securities.

So far as we can recall, in only two of the cases (*Lewis* v. *Commissioners*, 105 U. S. 739, 742, and *Chaffee* v. *Potter*, 142 U. S. 355, 364), decided by this Court, was there a requirement in the enabling Act, that the decision touching conditions precedent should in any way be made a part of the bond, or a matter of record. The "recital" of such decision in the bonds has uniformly been a purely voluntary act not required or suggested by the statute.

The third suggestion in the opinion, that because the Trustee was not an "agent" of the county his powers are to be considered less ample than would be similar powers vested in a county officer, is founded in a total misconception of the decisions of this Court.

A review of these will demonstrate that the conclusive force given to decisions by county officials, respecting conditions precedent, is in no sense whatever based upon any *agency* for the municipality, but rests exclusively upon the fact that the legislature has created a "tribunal" and vested in it the authority to "decide" a given question.

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The power of the tribunal and the force of its decision are alike *derived from the Act*, and not from the consent or direction of the municipality.

In *Bissell* v. *Jeffersonville*, 24 How. 287, 299, the court refers to the "jurisdiction of the subject-matter" as vested by the Act in the Common Council; and in *Coloma* v. *Eaves*, 92 U. S. 484, 489, the town clerk is referred to as the "arbiter."

In none of the cases has the conclusiveness of the decision and recital been based upon any supposed *agency* of the person authorized to decide; it has always been because of a power delegated or vested by the Act itself.

See quotation from *Coloma* v. *Eaves*, pp. 41, 42, *supra*.

See also:

Marcy v. *Oswego*, 92 U. S. 637, 639.
Chaffee v. *Potter*, 142 U. S. 355, 364.
Northern Bank v. *Porter Township*, 110 U. S. 608, 617.

But the following cases seem to settle the question beyond controversy:

In *Bernards Township* v. *Morrison*, 133 U. S. 523, 527, 528, the persons charged with execut-

ing and delivering the bonds *were not county officials* at all. They were special "commissioners" appointed by the Circuit Court of the county—exactly as the trustee herein was appointed by the County Court. The point now made for the county of Mercer was specially urged in that case. It was *held:* that the power to decide being "inferentially" granted *by the statute*, the county was estopped and that no question of agency was involved.

In *Andes* v. *Ely*, 158 U. S. 312, 324, the persons authorized to issue bonds and "*inferentially*" presumed to have authority to decide conclusively as to conditions precedent *were not county officials at all.* They were "special commissioners" appointed under authority of the enabling act.

In this respect those cases are exactly analogous to the case at bar.

We submit that the positive language of the Statute indicates a clear intention to impose upon the Trustee the duty and therefore the power to ascertain and to decide conclusively, "once for all," whether the conditions had been performed upon which depended his duty to withhold or to make delivery of the bonds.

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It remains to inquire whether the statute contains any qualifying terms which nullify this expressed intention.

But one expression is relied on as having that effect, to wit: that the bonds are to be held by the Trustee "in escrow."

We submit:

II. *The words "in escrow" do not so control or limit the rest of the Act as to show that the bonds were not to be made negotiable or that the Trustee was not empowered to decide conclusively as to the performance or non-performance of the conditions upon which, in express terms, it is declared to be his duty to make or to withhold delivery of the bonds.*

The Circuit Court of Appeals concedes that the term "in escrow" is strictly applicable only to deeds or similar writings obligatory: that it is not technically applicable to negotiable instruments.† (Rec. *page 65.)

†It is Text-book law that where a deposit is made "in escrow" of negotiable paper, the defense of an improper delivery or failure of the contingency, though good against the payee, will not avail against a *bona fide* holder for value. (6 Am. and Eng. Enc. of Law, pp. 867–869, citing *Vallett* v. *Parker*, 6 Wend. 615; *Fearing* v. *Clark*, 16 Gray, 174; *Clarke* v. *Johnson*, 54 Ill. 296.)

It is apparent, therefore, that there is nothing in the mistaken and colloquial use of the phrase "in escrow" to detract from the peculiar position of authority and responsibility conferred upon the trustee—itself a term involving the reposing of confidence.

But the court declares that the direction to hold in escrow "implies that the term was used just as it would be used if the subject matter of the deposit was a deed." (Rec. 59.)

The court ignores, as entitled to no weight whatever, the fact that at and before the delivery of the bonds all parties *construed the Act* as requiring that the road should be completed through the County only to the Cincinnati Southern Railroad; that the County Court (the sole fiscal agent of Mercer County), the County Judge, and the people believed, represented, and urged that the conditions had been performed and that the bonds should be delivered; that the road was stopped short of the Southern line of the County solely by reason of the urgent desire and request of the County itself; and that by reason of these facts the bonds came upon the market and the Provident Life and Trust Co. was induced to purchase them.

The Court insists that the words "in escrow" peremptorily forbid a consideration of any question save one: Was the condition of the escrow literally performed?

To that view we now direct attention.

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Manifestly, as conceded by the Court, we are not bound to construe the word "escrow" according to its strict technical definition at common law. Having been taken by the legislature out of its legitimate sphere, evidently in a colloquial sense, we must look to the context to ascertain the sense in which it was used. But the context embraces the entire act and its general purpose. There is no greater reason why the words "in escrow" shall limit or annul the other expressed purposes of the Act than that those words shall be qualified by its other provisions. The Act must be read so as, if possible, to make all its parts consistent. A reading which accomplishes that result is the true reading.

Giving to the words "in escrow" the meaning attributed to them by His Honor, Judge Barr, in the Circuit Court, all parts of the Act are consistent and harmonious. The "negotiability" of the bonds is preserved; the conditions of the escrow are required to be fulfilled; and a tribunal is recognized whose duty it is to *investigate, ascertain, and determine conclusively whether they have or have not been performed.*

As construed by the Circuit Court of Appeals, *two of the most important provisions* of the Act are completely *nullified.*

The argument to show that the construction given the Act by the Appellate Court nullifies the fundamental purpose to make the bonds negotiable has been made above and will not be here repeated. The decision itself settles that question. The Provident Life and Trust Co. purchased the bonds in open market, from a previous purchaser; it paid for them $101,197.22; it purchased *bona fide* without notice of any alleged defense; yet at the instance of the maker, because of the alleged non-performance of a condition precedent, the bonds in its hands are held to be void. Such bonds can not be termed "negotiable" securities.

The other provision of the act nullified by the Court of Appeals is that which requires that the Trustee "shall, before receiving such bonds, *give bond* with good surety, approved by the County Judge, for the *faithful performance of his or its duty* in the premises."

The opinion of Judge Barr gives full effect

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to this important provision. Under the opinion of the Circuit Court of Appeals it is useless and without meaning.

Let us consider just what this "bond" provides for.

To **hold** the bonds **until** and to **deliver** them **when** the road was completed was the **sole duty of the Trustee**; the bond was for the "faithful performance" of that duty. In its performance and therefore in the bond, the county and the railroad company had an equal interest.

That the County had an important interest to be protected is emphasized by the fact that the trustee is to be named and his bond is to be approved by the County Judge.

What, then, was the true nature of the County's interest? Against what unfaithfulness was it to be protected? If the Act be construed according to its plain natural import and in accordance with the decisions of this Court, its meaning is clear and simple. The trustee was vested with the power to decide whether and when the conditions precedent to the rightful delivery of the bonds were per-

formed, and thereby to put them forth as *negotiable* instruments. In that fact is found a full and sufficient reason for requiring of him a bond for the protection both of the County and of the Railroad Company. For a clearly wrongful or fraudulent delivery or refusal to deliver, the Trustee and his sureties would be liable to the party injured.

But, under the opinion of the Court of Appeals, the Trustee's bond was as to the County a useless and senseless formality. *There is under that opinion no conceivable state of circumstances under which the County could ever recover one dollar for a breach of the Trustee's bond*—unless *perhaps* for court costs in some litigation. But to hold that the bond refers merely to costs rather than to the substantial duty imposed on the Trustee, is simply to disregard the plain import of language.

A delivery of the bonds *before* completion of the railroad, whether made negligently, by collusion or with a view to embezzlement, would inflict no injury upon the County; because (according to the Circuit Court of Appeals) the bonds being in escrow are void

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in the hands of even *bona fide* holders. If lost, converted, or embezzled *after* completion of the road the Railroad Company might have a cause of action on the trustee's bond, but *the County would not.* The Trustee being the depository created by law and by consent of both parties, neither could recover from the other for his misconduct. In case of such default the Railroad Company could resort for compensation only to the Trustee and his sureties.

The Circuit Court of Appeals does not point out wherein the County can possibly have an interest in the trustee's bond except possibly in the matter of costs. It, however, concludes a brief reference to it in these words (Rec. 61):

> "It was eminently reasonable that the custodian of such securities, negotiable in form, should give security to protect both parties against negligence, conversion, embezzlement, or any willful refusal to faithfully perform the trust."

Precisely what effect "the negotiable form" of the bonds was supposed to have, in view of the opinion that the Act *does not* confer negotiability, we are unable to perceive.

It has already been shown that, on the basis of the Court's opinion, the bond offered no protection to the County (because the County needs no protection) in the matter of "negligence, conversion or embezzlement."

It remains to observe that, under that opinion, there could be no "willful refusal to faithfully perform the trust;" for the simple reason that the Trustee, absolutely, could have no duty *to* perform. If the Trustee had no *power* to decide whether the conditions had been performed, clearly he was subject to no *duty* to decide. If he was under no duty to decide, he was *under no duty to make delivery of the bonds;* for, by the express terms of the Act, delivery could not rightfully be made until the question of conditions performed was decided and conclusively settled.

If the Railroad Company should make demand for the bonds, on the ground that it had fully performed the condition precedent, the Trustee might rightfully respond: that having no power to decide, he was under no duty to investigate or inquire into the matter; investigation would be a useless labor; yet that he

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could not rightfully be required to subject himself and sureties to liability on his bond by possibly making a wrongful delivery; therefore that he should do nothing.

To refuse to deliver the bonds until ordered to do so by a Court, in a formal litigation, would be the only safe course to be pursued by the Trustee. But manifestly the Act did not contemplate such a course. In express terms it requires that when the conditions have been performed, the bonds "shall be delivered" *by the Trustee;* that duty is made compulsory. To perform, he must, of necessity, decide whether the conditions justifying delivery have or have not been performed.

Bond was required of him because of this grave and responsible duty; because of the trust reposed in him; because by a negligent or fraudulent putting forth or conversion of negotiable securities he might inflict injury upon either the County or the Railroad Company. Deprive him, by construction, of that trust, that confidence, that duty and power, and his bond is a formality without sense or meaning.

The canons of construction, established or recognized by this Court, will not tolerate such trifling with the language and purposes of an Act, whereby the legislature of a State invites the investment by strangers of $125,000 on the public faith.

But the Circuit Court of Appeals declares that even if the Act vests in the Trustee the duty and power conclusively to decide whether the conditions precedent to a rightful delivery of the bonds have or have not been performed, yet in this case his decision is ineffectual because it is not *recited in* or *endorsed upon* the bonds themselves.

This we conceive to be in radical conflict with the decisions of this Court; and, on the faith of the latter, we submit:

III. *The decision of the Trustee, that the conditions precedent had been performed, is not, by the statute nor by the decisions of this Court, required to be* recited in *or* endorsed upon *the bonds, and is not rendered ineffectual by the failure so to recite or endorse same.*

The Kentucky Statute certainly contains no requirement, expressly or by inference, that the

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decision of the Trustee shall be recited in or endorsed upon the bonds. Clearly a "recital" in the bonds was not contemplated: for they were to be placed in the hands of the Trustee fully executed before the work of construction was completed: or perhaps even before it was commenced. The Trustee was not a party to the bonds; had to affix no signature thereto; and could not therefore make any recital in his own name. The word "endorse" or its equivalent does not appear in the Act. The absence of such recital or endorsement, therefore, implies no default of statutory duty by the Trustee; it gave no notice to purchasers of the bonds that there was an irregularity in their issue.

But let us examine the question in the light of the decisions of this Court.

We will hereafter insist that, in effect, the decision of the trustee is "recited" in the bonds in controversy; but, for the purpose of testing the accuracy of the opinion under discussion, we shall consider it as if there were no such recital.

That there may be no misconception as to

the exact position of the Circuit Court of Appeals, we quote from the opinion (Rec. 53, 54):

> "Where railroad construction bonds have been issued in violation of the law under which authority was granted, THE MUNICIPALITY HAS NEVER BEEN HELD ESTOPPED to defend upon that ground, UNLESS REPRESENTATIONS APPEARED ON THE BONDS THEMSELVES importing full compliance with the conditions imposed by the enabling Act. The estoppel has been a CONSEQUENCE OF RECITALS or indorsements, etc."

In the case of the *Louisville Trust Company* v. *Louisville, New Albany & Chicago Railway Co.*, more recently decided (43 U. S. App. 550, 608), now also in this Court on a writ of *certiorari* (164 U. S. 707), the Circuit Court of Appeals refers to its opinion in this cause, and to that alone as authority, and says (TAFT, C. J.):

> "It now appears to be settled that in such cases the City or County can not be estopped to show irregularities in the issuance of the bonds UNLESS THERE ARE EXPRESS RECITALS of full compliance with statutory requirements, signed by an officer who has the implied or express authority by virtue of the statute to pass upon the question of compliance and to speak for the public corporation or *quasi* corporation issuing the same. *Mercer County, Kentucky*, v. *Provident Life & Trust Co., of Philadelphia*, 43 U. S. App. 21, 34, 37."

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That opinion goes one step further than the opinion in this cause, to wit: In declaring that even an *endorsement of the Trustee's decision* would be ineffectual, and that it must appear by way of "express recital" in the bonds themselves.

The importance of this declaration by the Circuit Court of Appeals can not be overestimated. Vast lines of securities regarded to-day as safe will be avoided by it if sustained by this court.

We submit that the opinion is not supported by any decision of the Supreme Court, and is in conflict with the reasoning and grounds upon which its various decisions rest.

The question, in express terms, has perhaps not been passed on by this Court; but its determination is *necessarily involved* in numerous decisions made by it.

In all but a few cases before this Court, the bonds in fact recited full compliance with the law. In every such case, where the persons issuing the bonds were authorized to decide as to conditions precedent, the recital was held to be equivalent to a decision and *therefore* conclusive. Where such authority did not exist, the recital was held to be valueless.

In the few cases of bonds without recitals it has appeared *either* that no decision had been made, *or* that the decision relied on was made by one without authority to decide. Here, for the first time, we encounter the case of one having (or assumed to have) authority to decide, and having actually decided that all conditions precedent were performed, and yet his decision is not recited in or endorsed upon the bonds.

A review of the decisions of the Supreme Court will show that the recital of the performance of conditions precedent, depends for its value exclusively upon the fact that it is the *evidence of* and is *equivalent to* a decision by the proper official; and that such *decision*, if in fact made, is equally conclusive although not incorporated in the bonds.

1. In only one case, so far as we can recall (*Lewis* v. *Commissioners*, 105 U. S. 739, 742), did the enabling Act require or contemplate that the bonds should contain either a recital or an endorsement as to the performance of conditions precedent; in every case the recitals have been purely voluntary.

It can not therefore be said that the Supreme Court has given effect to such recitals because of any supposed statutory force. Recitals have been held conclusive simply because they are the *evidence of a decision*, which decision is authorized or required by the statute in order to confer upon bonds a *negotiable* character.

2. That it is the *decision* by the proper official and not its *recital or endorsement* which confers a negotiable character on bonds, issued in fact before the performance of the conditions precedent, may be established by reference to the reasoning of this Court in many cases.

In the leading case of *Knox* v. *Aspinwall*, 21 How. 539, 544, the Court, after declaring that the conditions precedent had not been performed, said:

> "This would seem to be decisive against the authority on the part of the Board to issue the bonds, were it not for a question that underlies it; and that is, who is to *determine* whether or not the election has been properly held and a majority of the votes cast in favor of the subscription? Is it to be determined by the court, in this collateral way, in every suit upon the bond or coupon attached, or by the board of commissioners, as a duty imposed upon it before making the subscription? The court is of opinion that the question belonged to this Board."

Referring to the fact that "the bonds on their face import compliance with the law," the Court said:

> "The purchaser was not bound to look further for *evidence* of a compliance with the conditions to the grant of the power."

Manifestly in this great case the *decision* of the county officials is that which was held to give negotiability to the bonds; the recital was merely *evidence* of that decision.

In *Bissell* v. *Jeffersonville*, 24 How. 287, although the bonds contained the usual recital, the Supreme Court in its opinion does not in the slightest degree rely upon that fact. The opinion rests exclusively on the fact that the enabling Act committed to the Common Council of Jeffersonville *jurisdiction* to decide the question as to the performance of conditions precedent, and that in behalf of innocent holders of bonds its decision was conclusive. Dealing with the defense that the decision of the Council was in fact false, the Court said:

> "It only remains to consider the *effect of that determination*. . . . It must have been understood by the legislature that the bonds were to

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> be received by the company in payment for the stock, and used as a means of borrowing money for the construction of the road, and it could hardly have been expected that the object could be accomplished, if, by the true construction of the Act, it contemplated that the bonds should be issued before it was *conclusively determined* that the requisite number of legal voters of the city had petitioned the Common Council. . . . Duly certified copies of the record of the proceedings (of the Council) were *exhibited to the plaintiffs at the time they received the bonds*, showing to a demonstration that a further examination of the subject would have been useless."

The judgment of the lower court was reversed, because it had admitted evidence tending to show that the decision of the Council was untrue in fact.

Manifestly the negotiability of the bonds was made to rest not upon the recital in the bonds but on the fact of the decision.

In *Marcy* v. *Oswego*, 92 U. S. 637, 639, Mr. Justice STRONG said:

> "Where it may be gathered from the legislative enactment that the officers or persons designated to execute the bonds were invested with power to decide whether the contingency had happened, or whether the fact existed which was a necessary precedent to any subscription or issue of the bonds, their *decision is final* in a suit

by the *bona fide* holder of the bonds against the municipality, and a recital in the bonds that the requirements of the legislative act have been complied with is conclusive."

In *Coloma* v. *Eaves*, 92 U. S. 484, 490, the Court said:

"The persons appointed to decide whether the necessary prerequisites to their issue had been completed have decided, and certified their decision. . . . Their recitals are such a decision; and beyond those a *bona fide* purchaser is not bound to look for *evidence* of the existence of things *in pais*."

In the same opinion the Court has drawn the very distinction for which we contend. Quoting from Dillon on Municipal Corporations, to the effect that the "*determination* of a matter *in pais*" by the tribunal "invested with power to decide whether the condition precedent has been complied with" is conclusive, the Court say, that "this is a very cautious statement of the doctrine. It may be restated in a slightly different form," and continue (p. 491):

"Where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds

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> issued by them and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality, *for the recital is itself a decision* of the fact by the appointed tribunal."

The necessary inference from this language is, that the Court approves the "cautious statement" of Judge Dillon that the *decision* is conclusive, and then goes a step further and holds, that even though there has been no express determination, yet a recital estops the county because, in favor of a *bona fide* holder, *it is a decision.*

In *Kenicott* v. *Supervisors*, 16 Wall. 452, 464, the Court said it was settled that,

> "A recital that the election has been held, or that the fact exists, or has taken place, will be sufficient *evidence* of the fact to all *bona fide* holders of the bonds."

In each of these cases *the fact of the decision* is declared to be the controlling fact; the recital is merely referred to as the *evidence* or certificate of the decision; in neither of them is there a suggestion that the decision depends for its conclusive force upon its recital in the bonds. The entire ignoring of the fact of recital in *Bissell* v. *Jeffersonville*, coupled with the decla-

ration that proceedings of the Council "were exhibited to the plaintiffs at the time they received the bonds," conclusively establish that the mere recital was deemed unimportant except as evidence of the fact of decision.

The authorities referred to by the Circuit Court of Appeals in support of its proposition are (Rec. 54),

Coloma v. *Eaves*, 92 U. S. 484.
Dixon v. *Field*, 111 U. S. 82, 93.
German Bank v. *Franklin County*, 128 U. S. 526.
Citizens' Association v. *Perry*, 156 U. S. 692, 701.

Neither of the cases sustains the opinion of the Court.

Coloma v. *Eaves*, as reviewed above, contradicts rather than supports its opinion.

In *Dixon* v. *Field* the bonds were held void, ***although there was a full recital***, because the statute fixed an "express and definite record of a public character," and therefore the County officials had no power to make any decision respecting the performance of the conditions precedent. (See No. III, pp. 21, 22, *supra*.)

In *German Bank* v. *Franklin County*, the bonds ***contained no recitals***, and the certificate of

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the auditor attached to the bonds, as stated by this court, neither "covers or certifies any fact, as to compliance with the conditions prescribed" (128 U. S. 540); and furthermore, the auditor *had no power to decide* any thing relative to the bonds. The decision of the court rests distinctly upon the ground that there was no decision, as to conditions precedent, by any authorized tribunal or officer.

In *Citizens' Association* v. *Perry* there was neither a recital in the bonds of compliance with the Constitution of 1870, *nor* was there *any decision* by an authorized officer that the conditions precedent had been performed.

The cases are inapplicable to support the opinion of the Circuit Court of Appeals. In no case has it been held or intimated that a recital on the face of bonds is essential to give validity to the decision of an authorized officer in respect to the performance of conditions precedent.

If the petitioner on purchasing the $100,000 of bonds inquired and found that the Trustee had decided that the conditions precedent had been performed; that the County Court

expressly concurred in that decision as correct in fact; and that under such circumstances the bonds were then issued, was it not entitled to rely upon such information quite as securely as upon a recital in or an indorsement on the bonds? The indorsement is only evidence of the decision; and evidence of the decision would seem to be sufficient whether by way of indorsement or otherwise.

Looking into the real nature of the thing, there is no reason why a recital or indorsement of the decision should be given any peculiar force. There is the strongest reason why the decision itself should be conclusive. The power and duty to decide as to conditions precedent are vested in the person empowered to put forth negotiable securities, because a conclusive determination of the question of the legal right to issue them is essential to give them negotiability. The tribunal is created, and power to decide finally is conferred in order that purchasers may be able through its decisions to ascertain, certainly and authoritatively, in advance of taking the securities, whether they are rightfully issued.

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How that decision shall be communicated is immaterial, if, as in this case and generally, no specific method of communication is provided by the statute. Certainly in the absence of a statutory direction to that effect a recital of the decision in or its indorsement on the bonds can give to it no increased force or value. Indeed there would seem to be no special propriety in the making of such recital or indorsement. Negotiable bonds are expected and desired to be free from all extraneous matter.

The decision once rendered and communicated to the parties, and the bonds delivered pursuant thereto, the duty of the depository would seem to be at an end.

It was stated above that we should insist that, in fact, there is the **equivalent of a recital** of the Trustee's decision on the face of the bonds.

That contention we base upon the following facts and reasoning:

The bonds when delivered by the Trustee contained a statement that they were issued "*pursuant*" to the enabling Act—a recital

uniformly held by this Court to be equivalent to a declaration that "all conditions precedent have been performed." (See VI, pages 23, 24, *supra.*)

It is true that the bonds being executed by the County alone, through its County Judge and County Clerk, this representation does not in terms purport to proceed from the Trustee. It is also true that any purchaser might have ascertained from the Act that these bonds were required to be placed in the hands of the Trustee before the conditions precedent had been performed.

Standing alone these facts would seem to negative the statement we are now attempting to prove.

But this important fact must not be overlooked: The statute did not require that the bonds should contain any statement or recital of conditions performed or any statement that they were issued pursuant to either the Act or the subscription contract. That recital was purely voluntary.

The Trustee had no right to deliver the bonds until in fact the conditions had been

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performed. When therefore he delivered the bonds in question, with that recital, it was an *adoption by him of the recital* and the equivalent of such recital by himself.

We do not contend that a mere *delivery* by a Trustee of bonds, containing no recitals, is equivalent to a decision. Doubtless the County is entitled to have an actual decision made by the Trustee; and, if he should deliver the bonds without in fact having made a decision or placing on them a declaration which is the equivalent of decision, the County might claim that even a purchaser for value without notice was not an *innocent* purchaser because he should in some way have informed himself whether the Trustee had or had not decided the question *which the law required him to decide* before delivery.

The mere fact of the bonds being on the market perhaps would not conclusively establish that they had been put out by the authority of the Trustee; for perhaps they might have been stolen from him.

What we do maintain is that the putting forth of the bonds by the Trustee with a voluntary recital therein that all conditions prece-

dent have been performed has the same effect as if he had made an indorsement of his decision thereon.

When it is shown further that the Trustee's decision was in fact made in good faith; that it was communicated to the original parties; that it was accepted by them as just and no attempt made to prevent the issue of the bonds, and that they were in fact thus issued by the authority of the officer or tribunal designated by law for the purpose; it is sufficiently established that the bonds are *negotiable* securities against which no defense can be successfully interposed by the maker.

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THIRD POINT.

On the face of the bonds it was represented that they were issued "pursuant" to the enabling statute; before, at and after delivery of the bonds, the County publicly represented and declared that all conditions precedent had been fully performed; it consented to and actively participated with the Trustee in their delivery to the railroad company; it received and still retains, as its own, the capital stock in payment for which the bonds were issued; it voted said stock on sundry occasions and on resolutions vitally affecting the organization and general welfare of said railroad company; for several years it levied a tax for and paid regularly the interest on said bonds; and by its said conduct the County of Mercer is estopped to question the validity of the bonds.

Each of the statements above recited is found by the trial court to be true. The facts so found are conclusive, and we have to inquire only as to their legal effect.

The case, it will be perceived, is not one wherein a bondholder is endeavoring to enforce the payment of bonds fraudulently issued or for which the County has received no substantial consideration. It is rather an attempt by the County to escape, by a pure technicality, from

the obligation of bonds issued with its free consent, for a consideration which itself declared to be a full, complete, compliance with its contract and with the law, and which, confessedly, gives to-day, in substance, all the benefit that might have been derived from the most technical compliance with the statute.

In effect, it is conceded by the Circuit Court of Appeals, and by counsel for the County, that if the County of Mercer has legal power to create an estoppel its action does estop it to make defense to the bonds in question.

The contention is that the County possesses no such power. It is stated, at the close of the opinion of the Circuit Court of Appeals, about as follows:

The County had no power to issue the bonds until the actual completion of the railroad; "that condition having never been complied with, neither the County Court nor the County Judge could by any act of omission or commission waive its performance;" nor could they "validate them by subsequent acts of ratification . . . ratification can only be effective when the party ratifying possesses the power to perform the act ratified." (Rec. 61.)

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In support of this view the court cites,

Marsh v. *Fulton County*, 77 U. S. 676–684.
Norton v. *Shelby Co.*, 118 U. S. 425–451.
Doon Township v. *Cummins*, 142 U. S. 366–376.

This undoubtedly raises a most important legal question.

We frankly concede that the position of the Court, as applied to bonds issued *wholly without authority*, is perfectly sound.

As applied to *negotiable bonds* which the County is authorized to issue, *provided* some condition precedent is performed (said condition being one the performance or non-performance of which rests *in pais*), that position is unsound and is in conflict with the settled rules established by the decisions of this Court.

The true rule we take to be this:

If, on the face of the Act, a county has no power to issue negotiable bonds, or if an established record standard or the decision of an authorized tribunal declares that a condition precedent has not been performed, it conclusively follows that bonds issued are void and neither representations nor ratification will validate them.

But if authority be given to issue negotiable bonds on the performance of conditions precedent, and if *neither* a record standard *nor* a tribunal to decide be established by the Act, it follows, of necessity, that the ascertainment of the fact is *left to the parties interested;* and if they ascertain and agree upon the fact and unite in representing that the conditions have been performed, their action creates an *estoppel* on behalf of a *bona fide* purchaser of such bonds. The County will not thereafter be permitted to question the fact which it has thus *declared to be true, and which the law affords no certain means of showing to be untrue.*

Let us see how far the cases cited by the Circuit Court of Appeals sustain its extreme position.

Afterward we shall invite attention to several decisions which we conceive establish the view for which we contend.

I. Marsh v. Fulton Co., 77 U. S. 676-684.

The facts were that Fulton County, by a vote of its people, authorized a subscription for the bonds of the Mississippi & Wabash Railroad

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Company—having a continuous line of railroad of 230 miles across the entire State.

That corporation was afterward by law dissolved and three new corporations created in its stead. The county officials subscribed for the bonds of one of these, having a line of but 60 miles in length and which this court declares was a "*different corporation* from the original company."

Manifestly there was a clear lack of power to subscribe at all. No question of the performance of conditions precedent was involved.

II. Norton v. Shelby County, 118 U. S. 426.

The bonds here issued were confessedly invalid in their inception. Ratification by the "Board of Commissioners of Shelby County" was relied on as validating the bonds.

It was held that the Board itself, whose act was relied upon, "had no lawful existence; that it was an unauthorized and illegal body . . . that their action in holding a County Court was void."

Clearly this is no authority for what a County Court or a County Judge, lawfully constituted and convened, may or may not do relative to

ratification or any thing else. The case is simply inapplicable to this controversy.

III. Doon Township v. Cummins, 142 U. S. 366.

This case decides that bonds, issued in express violation of the Constitution of the State, in the hands of one who purchased them from the municipality "*with knowledge* that the constitutional limit is thereby exceeded," are void.

The decision proceeds wholly upon two facts, neither of which exists in this case. The Provident Life & Trust Company did not purchase from the County or the Railroad Company, and it had no knowledge or notice of any alleged defect or infirmity in the bonds.

It is manifest that neither of the cases relied on supports the principle announced by the court. They refer to a state of case wholly different, in their facts and in the questions involved, from the case at bar.

It remains to examine the *cases which bear an analogy* to this cause.

IV. Pendleton County v. Amy, 13 Wall. 297, 304-5.

The case, so far as relevant to this contro-

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versy, turned upon the question: whether the third plea by the county (defendant) to an action on its bonds, was good. On demurrer it was *held*, that "the third plea can not be sustained."

The plea, in substance, averred that the legislative authority to issue the bonds in question was coupled with a "*proviso*" that before the bonds should be issued it should be *authorized by a vote* of the people of the county, and that the question had *never* been "submitted to be voted upon by the voters of Pendleton County in conformity with said Acts."

It was held that the plea was insufficient because it did not negative the idea that the bonds contained recitals dealing with that question *nor* show "whether the officers of the county have *levied taxes* to *pay interest* on them or whether any interest has been paid."

Referring to the cases theretofore decided, the court say:

> "It has more than once been decided that a county *may be estopped* against asserting that the conditions attached to a grant of power were not fulfilled The estoppel in these cases was *either* by recitals in the bonds that the conditions prec-

edent had been complied with *or* by the fact that the county had subsequently *levied taxes to pay interest* on the bonds."

It is further said:

"The county *received* in exchange for the bonds a certificate for the *stock* of the railroad company, which it held about seventeen years before the present suit was brought and which it *still holds*. Having exchanged the bonds for the stock, can it retain the proceeds of the exchange and assert against a purchaser of the bonds for value, that, although the legislature empowered it to make them and put them upon the market upon certain conditions, they were issued in disregard of the conditions? *We think that they can not*, and therefore that the third plea can not be sustained."

It will be observed that although the demurrer to the plea admitted that the fundamental condition precedent, viz: a vote authorizing the issue of bonds, was not performed, yet the county might have become *estopped* from raising that question either by levying taxes and paying interest or by receiving and retaining the stock for which the bonds were given in exchange—exactly two things done by the County of Mercer in this case.

V. Supervisors v. Schenck, 5 Wall. 772, 780.

The election required by law, as a condition precedent to an issue of bonds, had been called

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improperly by order of the County Court instead of by the Board of Supervisors. The Board of Supervisors, however, ratified the proceeding afterwards by issuing the bonds. The bonds passed into the hands of *bona fide* holders. The county had for several years paid taxes on the bonds.

Held: That the county was *estopped* to question their validity.

Say the Court:

> "Preliminary proceedings looking to such a subscription by a municipal corporation may often be enjoined for defects or irregularities before the contract is perfected, in case where the corporation will be held to be forever *concluded, if they remain silent* and suffer the shares to be purchased, the bonds to be issued, and the securities to be exchanged. Nothing of the kind was attempted in this case, and the defendants have never rescinded, or attempted to rescind, the contract, *and have never returned, or offered to return, the evidences of their ownership of the shares in the stock of the Company, but have annually acknowledged the validity of the bonds by voting taxes for the payment of the accruing interest*, and have actually paid the same to the extent of six thousand dollars. . . . All of the Acts of the Board of Supervisors of the county in making the subscription, purchasing the shares, issuing the bonds, and exchanging the securities, appear *to have been open and well known to the*

corporation, and yet they constantly suffered themselves to be represented in the choice of officers and in the management of all the affairs of the railroad company, and have voluntarily voted taxes for the payment of the yearly interest on the bonds, and actually paid the same, as admitted in the special plea. Examined in the light of those suggestions, it would be difficult to imagine a case where the rule that a subsequent *ratification is as good as a previous authority* can be more justly applicable than in the case under consideration."

VI. Ray v. Vansycle, 96 U. S. 675, 687-8.

A defense being made that a subscription to one railroad company had been unlawfully transferred to another, and that the bonds issued under it were therefore void, this Court said:

"There is nothing in the record upon which to base any imputation of collusion or bad faith. The action was taken under such *circumstances of publicity* as to *notify the taxpayers* generally of all that was doing; and we are not prepared to say that the court had not the power to transfer the subscription from the North Missouri Railroad Company to the St. Louis and St. Joseph Railroad Company, and deliver the county bonds to the latter upon its agreement to build substantially the same road for the construction of which the original subscription had been made.

"But *whatever doubt* exists upon this point should be resolved in favor of the *bona fide* holders of the bonds. The taxpayers of the county

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should not, under the peculiar circumstances of this case, be now heard to allege that their agents, invested by statute with the authority and charged with the duty of protecting their interests, had exceeded their powers. . . .

"But this is not all. In payment of the county subscription and bonds, certificates of stock in the St. Louis and St. Joseph Railroad Company were issued to the county, and are *still held* by it. They have never been tendered for cancellation. When the court declared, in 1873, that the county would pay neither the principal nor the interest due on the bonds, no intimation was given of even its willingness to surrender the certificates.

"Upon the clearest principles of justice the taxpayers of Ray County are *concluded* by the acts of their official agents, and by their own *failure*, either intentionally or from neglect, to *assert by appropriate proceedings*, their legal right (if any they ever had) to prevent the transfer of their original subscription to the company, which, by the construction of its road, gave them greater railroad facilities, and at no greater cost, than they could have obtained under the contract with the North Missouri Railroad Company."

VII. Meyer v. Muscatine City, 1 Wall. 384, 393.

In response to a plea that bonds were void because the question of subscription had *not* been *submitted to a vote* in the form required by law, the Court, passing that question without decision, *held*, that the county was *estopped* to raise it. It was said:

> "The record shows that all the votes cast except five were in favor of the loan. The city and citizens adopted and acted upon the ordinance as valid and sufficient. The citizens voted, and the city authorities issued the bonds. *No one interposed to prevent their issue.* It is not questioned that all the parties acted in good faith, and the *city can not now be heard* to object to the regularity of its own proceedings. A party taking the bonds was bound to look to the legal authority under which the public agents acted. If that were sufficiently comprehensive, he had a right to presume that those empowered to act and acting under it had complied with its requirements."

We submit that the decisions of this Court clearly contravene the position of the Circuit Court of Appeals and establish that a county may by estoppel lose a defense otherwise perfectly good and based upon the invalidity of its bonds.

There is one circumstance which peculiarly demands that the estoppel should be here applied.

The Subscription Contract (not the Act) required that, in order to entitle the railroad company to receive the bonds, the road should be "so completed by the county," etc., *within five years* from the subscription.

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When the road had been completed to Burgin on the Cincinnati Southern Railroad the question came up for discussion whether that was a compliance with the statute. Some doubt being expressed, the Louisville Southern Railroad Company at once prepared to extend the road to the Boyle County line.

The County Court, by an order entered on its records, expressed to the trustee the "opinion that such delivery (of the bonds) should be made, and the construction of the railroad not forced to the Boyle County line." The entire county concurred manifestly in this opinion, as during more than a month after the time no effort was made by the county or any citizen to prevent it. At the request of the County Court, therefore, the road was stopped at Burgin.

At any time, thereafter, for three and one-half years, the road might have been completed to the county line and a right to the bonds conclusively established.

By the delivery of the bonds and by continuous payment of interest, the railroad company was induced to withhold the extension.

As soon as the five years elapsed the county refused to pay further interest, and made the point that the bonds had been illegally delivered.

To permit that defense, under the circumstances, would be to countenance a distinct and apparently intentional fraud by the county.

But this court has declared more than once that a *county*, "quite as much as an individual, is *held to a careful adherence to the truth* in their dealings with other parties, and can not by their representations, or silence, involve others in onerous engagements and then defeat the calculations and claims their own conduct has superinduced."

Bissell v. *Jeffersonville*, 24 How. 287, 300.
Zabriskie v. *Cleveland, etc., R. R.*, 23 How. 400.

In *Moran* v. *Commissioners of Miami County*, 2 Black, 916, the views of this Court are thus expressed:

> "The object of this court has been in cases of a like kind, and it is still its purpose to give to the contracts of counties, for the purchase of railroad stock and borrowing money to aid in the construction of railroads and other internal improvements, a strict interpretation of the legisla-

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> tive acts empowering them to do one o. the other; but at the same time to *give protection* to the *bona fide* holders of such contracts as have been put on sale in the money market, by corporations or by counties acting corporately, against their efforts to be relieved from their responsibilities of official acts in putting such papers into circulation, for c' italists to invest money in them, *on assurances that the principal and interest would be paid accordingly.*"

The foregoing argument proceeds upon a tacit concession that the decision of the Trustee is contrary to the truth, and that the Louisville Southern Railroad was not in fact completed through the County of Mercer within the meaning and intent of the statute. We shall now endeavor to show:

FOURTH POINT.

That before delivery of the bonds sued upon, the Louisville Southern Railroad was, in fact, completed through the County of Mercer within the meaning and intent of the statute; that even if this be not true, within the strict technical definition of the words used, yet the statute is capable of a construction whereby the building of the road through Harrodsburg to Burgin, on the Cincinnati Southern Railroad, was a substantial compliance with the condition precedent as to completion through the county; that it was in good faith so construed by the county, by the Railroad Company and the Trustee, before, at and after the delivery of the bonds, and that such contemporaneous construction adopted and acted on by all parties in interest should now be adopted by the court.

His Honor, Judge Barr, declined to find as a fact whether or not the road had been "completed through the County"—deeming it unnecessary in view of his conclusion that the decision of the trustee was conclusive.

He did, however, find all the facts necessary to determine the question. The only thing remaining to make his decision complete is to define the word "through," as used in the Act. That being purely a question of construction, this court may rightfully deal with it.

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The Circuit Court of Appeals construed the Act as requiring a completion of the railway through the county "from one side or line to the opposite *or another* side or line." (Rec. 49).

An Act, like a contract, is to be construed in the light of its general purposes, and each part of the Act in view of its context.

The word "through" is frequently used to signify something other than "from one side to the opposite." If one should say "I rode through the Park;" or "I walked through the City;" or if an engineer should report a line of road as built "through the mountains" no one would assume that the word was used necessarily to express passage from one side to the opposite. The dictionaries give numerous meanings to the word "through."

The situation of the county, the known wishes of its people, the objects and purposes to be attained indicate that there was no purpose to confine the meaning of the word "through" to so narrow a significance. No point is mentioned on either line of the county to or near which the railroad shall extend. Indeed, there is not a town nor any point on either line of

the county to which there would be the slightest propriety in specially extending a railroad —unless for the purpose of forcing its extension southwardly or eastwardly beyond the limits of Mercer County. But there is nothing in the authorizing Act nor in the charter of the Railroad Company which requires an extension of the line beyond Mercer County.

Assuming that the road was not compelled to pass beyond the boundaries of Mercer County, the soundest reasons exist to believe that it was the legislative intent that the road should be permitted to terminate just where it did—on the Cincinnati Southern Railroad near the south line of the county.

If extended to the east county line, the road would end in the middle of Dix River, and the short branch east of the Cincinnati Southern would be worthless. If extended to the Boyle County line (unless to the point crossed by the Cincinnati Southern) that part of the road beyond Harrodsburg would be similarly worthless. To have connected with the Cincinnati Southern on the Boyle line would have afforded no advantage to the County of Mercer greater

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than or different from the connection at Burgin.

On the other hand, an extension of the road to any other point on the south or Boyle County line would inevitably have forced its completion to Danville—the active rival of Harrodsburg—a thing to which the interests, the prejudices, and the passions of the Mercer County people were actively hostile.

No sound business reason can be suggested; no reason is suggested by the Circuit Court of Appeals for its very narrow construction of the word "through" except that it is the *ipse dixit* of the legislature. ***But that is the very question at issue.***

The object of the Act was to invite and to secure a road through the county—entering anywhere, extending in any direction, except that it should reach the county seat. Communication with Louisville, the initial terminus of the road, was its object. Beyond this there was no specific purpose as to the location or length of the road through the county.

There was, however, one object to be carefully guarded and attained, viz: that the county

should not put out its bonds for the construction of a railroad that was not and might *never be completed.* The language is peculiar: that before the bonds shall be delivered, the road shall have been "so completed through the county that a train of cars shall have passed over same." Manifestly the emphasis is upon the completion of the road; completion demonstrated by the actual passage of cars. To insure completion of the road, at least to or through (not necessarily beyond) Harrodsburg was the purpose of the Act, and that purpose was substantially fulfilled by the construction of the road through Harrodsburg to the Cincinnati Southern at Burgin.

An illustration of the fallacy of the reasoning of the Circuit Court of Appeals lies in its concession that the words "completed through the county" might have been fulfilled by a completion of road from the north line to "another," viz: the eastern or adjacent line rather than to the "opposite" line.

Such a construction of the Act, while consistent with the dictionary definitions, shows how various may be the meanings of the word

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"through." It would accept as a performance of the condition precedent a mere passage across one corner of the county—perhaps not giving one third or one tenth either of the actual distance or of the business facilities afforded by the road as built.

On the other hand, if the road, instead of coming by the Lawrenceburg route, had been constructed via Springfield, and, entering the county on the south line near its western line, and extending thence in a direction measurably parallel with the south line, had, near the extreme eastern border of the county, recrossed the southern line and passed on to Eastern Kentucky, the condition would not have been performed and the bonds could not lawfully have been delivered.

We submit that the Act is not subject to such frivolous objections; that the condition precedent respecting the completion of the road was substantially performed, and that the trustee's decision is intrinsically sound.

But if this reasoning be not accepted as absolutely correct, we submit that the *contempora-*

neous construction of the Act by the parties concludes the question.

The fact that the Act was construed by all parties, including the county officials and the citizens of the county, in the manner suggested above, does not admit of controversy.

The facts found by the trial court: that this particular question was "publicly and generally discussed" (Rec. 27); that the County Court, consisting of the County Judge and all the magistrates, was convened for the purpose of considering it; that as early as June 26, 1888 (more than a month before delivery of the bonds), the County Court entered on its records a declaration that its members "are of opinion that such delivery should be made and the construction of the railroad not forced to the Boyle County line" (Rec. 28); that although Pearson, Trustee, afterwards expressly notified the County Judge and the County Court of his purpose to deliver the bonds unless objection were made, that no objection was made by either the County Judge, the County Court or any citizen of the county (Rec. 9); that the Louisville Southern Railroad Company had actually pre-

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pared to extend its road to the Boyle line, having acquired the rights of way for practically the whole distance and was induced to renounce its purpose by the opposition thereto of the county itself (Rec. 27); that the Trustee delivered the bonds, though liable on his bond for a wrongful delivery; that the county received the stock of the Railway Company for which it had subscribed, and was present by its County Judge and participated in the delivery of the bonds (Rec. 28, 29): and that for three and a half years the County paid the interest on the bonds; these facts, we submit, place beyond dispute that all parties construed the Act to require nothing beyond what, in fact, was done, in order fully to perform the conditions precedent.

That such construction was adopted in good faith is equally clear. It was adopted after full public discussion and careful consideration: at a time when the Louisville Southern Railroad Company was able and willing to extend its road to the Boyle line; and to hold that it was not in good faith implies duplicity in the county officials amounting to perfidy—of which

no intimation is contained in the special findings of fact by the court. If such fraudulent purpose really existed, it would form a conclusive ground of estoppel.

We shall rely upon the previous argument to establish that the Act is possibly *open to the construction* thus placed upon it; that a contrary intent is not so clearly expressed but that men of reasonable intelligence and of honest purpose might adopt it; and upon that assumption, proceed to inquire, to what effect is such contemporaneous construction entitled?

In *Lawson on Contracts* (Sec. 389, Subsec. 7) it is said that the "courts will consider, where the intent is doubtful, the manner in which the contract has been executed by both or one of the parties with the express or implied assent of the other," citing numerous authorities.

In *Beach on Contracts* (Secs. 721-722) it is said:

> "Where the language of a contract is *susceptible of two meanings*, the Court will infer the intention of the parties, and their relative rights and obligations, from the circumstances attending the transaction."
>
> . . . . . .

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> "If the words or terms are equivocal, resort may be had to the circumstances under which the contract was executed and to the *contemporaneous construction given to the contract by the parties*, as evidenced by possession or similar acts. The subsequent acts are admitted to show *how the parties understood their contract*, and are a *practical construction of it*."

In a note to Sec. 722 he says:

> "The practical construction put upon a contract by the parties to it is sometimes *almost conclusive* as to its meaning."

If this controversy existed between individuals, *sui juris*, there can be no doubt that their contemporaneous construction of their contract, so clearly expressed, so persistently acted on, would be accepted by a court as conclusive of its true meaning.

If a contract be capable of two constructions, the court will adopt that construction which the parties themselves gave to it during performance, if in fact they agreed upon a given construction. Especially will this be done in favor of one who has been induced by the other party to adopt a particular construction; upon the faith of it to expend large sums of money for the benefit of the other party; and when

the last named party has received and still holds the consideration which the other was thus induced to surrender upon the faith of such agreed construction of the contract.

The rule is demanded by justice and fair dealing. The party required to perform may be quite willing and able to perform according to either construction of the contract—as in fact the Railway Company was in this instance. To permit the other to mislead him in the construction of a doubtful clause and then to defend himself by reason of it, would be to sanction the gravest injustice and fraud.

But it may be contended that such a rule is confined to individuals and can have no application to a statute nor to a municipal corporation.

But this court, recognizing that a private Act which is made the basis of a contract is subject to the same rules of construction, has distinctly held otherwise.

In *Mercer Co.* v. *Hackett*, 1 Wallace, 83, 94, where, by statute, a condition precedent to a county subscription to railroad stock was, that it should previously have been "designated,

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advised, and recommended by the grand jury," the defense was offered that the subscription had only been so "recommended."

The Supreme Court say:

> "It would require no great latitude of construction to treat this, as the commissioners might justly do, as a substantial compliance with the Act. But it would be *contrary to good faith and common justice* to permit them to allege *a newly discovered construction of an equivocal power* after they have sold the bonds and they have passed (as is admitted in this case) into the hands of *bona fide* purchasers for value."

In *City of Chicago* v. *Sheldon*, 9 Wallace, 54, wherein the controversy turned upon the *construction of an ordinance* of the city of Chicago, the Supreme Court say:

> "What adds great weight to this view is, it *accords with the practical construction* given to the contract by both parties. . . . In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the *practical interpretation* by the parties themselves is entitled to *great if not controlling influence*. . . . But in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur there can be no great danger in the adoption of it by the court as the true one."

In *Van Hostrup v. Madison City*, 1 Wall. 291, 297, this court in construing a city charter say:

> "Even if the case had been doubtful, inasmuch as the *city authorities have given this construction* to the charter, and bonds have been issued and in the hands of *bona fide* purchasers for value, *we should have felt bound to acquiesce in it.*"

To the same effect see

City of Savannah v. *Kelly*, 108 U. S. 184, 191.
Topliff v. *Topliff*, 122 U. S. 121, 131.
United States v. *Alabama R. R. Co.*, 142 U. S. 615, 621.

If the foregoing reasoning be sound, it follows that the conditions precedent respecting completion of the road were fully performed and that the *decision of the Trustee* strictly *conforms to the truth* as established by the evidence: The bonds were fairly earned and the judgment of the trial court should be affirmed.

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LOUISVILLE, KY., JANUARY 1, 1898.

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